No. 75-1844

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE LOVASCO, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CITATIONS

Cases:

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-11a) is reported at 532 F. 2d 59.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 12a) was entered on February 23, 1976. On

April 21, 1976, the court of appeals denied a petition for rehearing, with suggestion for rehearing *en banc* (App. C, *infra*, p. 13a). On May 11, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 20, 1976 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who seeks the dismissal of an indictment because of pre-accusation delay must show that the government sought the delay to secure an improper tactical advantage as well as that the delay impaired his ability to defend against the charges.

2. Whether, barring exceptional circumstances, a district court should reserve ruling on a due process claim based upon pre-accusation delay until after trial, at which time the defendant's allegations of prejudice can be assessed in light of the evidence introduced at trial.

STATEMENT

Respondent was indicted on March 6, 1975, in the United States District Court for the Eastern District of Missouri on three counts of unlawful possession of materials stolen from the mails, in violation of 18 U.S.C. 1708, and on one count of engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 924(a). The indictment referred specifically to eight handguns

that respondent allegedly had possessed and sold between July 25 and August 31, 1973.

On March 18, 1975, respondent moved—pursuant to Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment[1]—to dismiss the indictment. He alleged in his motion that (1) the government had completed its investigation of the matters referred to in the indictment on September 26, 1973; (2) the government thereafter had delayed presenting its evidence against him to the grand jury for a period of approximately eighteen months; (3) the delay in presenting such evidence was unreasonable; and (4) the delay had prejudiced him by causing him to suffer anxiety and concern. Respondent made no allegation that the government had sought the delay to secure an improper tactical advantage, and he made no effort to particularize the respects in which the delay had impaired his ability to defend against the charges.

On April 25, 1975, the district court held a hearing on respondent's motion to dismiss. The government stipulated at the outset of the hearing that respondent had been interviewed by a postal inspector in September 1973 concerning a series of thefts from a mail facility operated by the Terminal Railroad Association in St. Louis, Missouri (H. Tr. 4).

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[1] Since respondent did not become an "accused" until he was indicted on March 6, 1975, his reliance upon Rule 48 and the Sixth Amendment was obviously misplaced. See *Dillingham* v. *United States*, 423 U.S. 64 (*per curiam*); *United States* v. *Marion*, 404 U.S. 307, 313, 319.

The government also stipulated that, although investigation of the thefts had continued thereafter, only one witness had been discovered following respondent's interview who might have bolstered the government's case against him (H. Tr. 4-5).

In support of his allegation that the government had sufficient evidence as of September 1973 to warrant presenting the case against him to the grand jury at that time, respondent introduced at the hearing a report that had been prepared by Postal Inspector G. P. Wellner. The report was dated October 2, 1973, and had been forwarded to the United States Attorney at that time (H. Tr. 19). The report indicated that between August 20 and September 5, 1973, government agents had purchased four semi-automatic pistols from David Northdurft and Martin Koehnken. These pistols had been sold by the Browning Arms Company to various retailers but had been stolen prior to their receipt by the retailers, after mailing from a Terminal Railroad Association facility in St. Louis. Government agents arrested Koehnken on September 11, at which time they seized four additional stolen handguns.[2] Subsequent investigation revealed that Koehnken had purchased the guns from Joe Boaz. Boaz was interviewed on September 24, 1973, and admitted that he had known that the guns were "hot" when he sold them to

[2] Koehnken subsequently pleaded guilty to a single count charging him with having engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 924(a).

Koehnken. Boaz also stated during the interview that he had obtained all eight guns from respondent between July 26 and September 11, 1973.

Respondent, a switchman for the Terminal Railroad Association, was interviewed on September 26, 1973. He claimed that after having visited his son, a mail handler for the Railroad Association, he had found "four or five" handguns in a sack in the back seat of his automobile. He admitted selling the guns he had found to Boaz, but he specifically denied having sold Boaz all eight of the guns that had been purchased or seized from Koehnken. The report also indicated that respondent would not have had access to insured mail parcels in the normal course of his duties as a switchman and that, although his son would have had such access and had endorsed three of the four checks that Boaz had given respondent as payment for the guns, the postal inspectors had no direct evidence at that time that respondent's son was responsible for the thefts.

Respondent testified at the hearing that two "possible" witnesses on his behalf had died during the eighteen-month delay referred to in his motion to dismiss—his brother and Tom Stewart.[3] He testified that his brother, who had worked prior to his death at the same place of business as Boaz, had introduced him to Boaz and had been present when he made ar-

[3] Respondent testified that Stewart had died approximately six months before the date of the hearing and that his brother had died in April 1974, approximately one year before the hearing (H. Tr. 7-8).

rangements by telephone to obtain guns to sell to Boaz (H. Tr. 6-7, 9). Respondent also testified that he had obtained "some of the guns" identified in the indictment from Stewart and that he had arranged to obtain those guns by telephoning Stewart from Boaz's office (H. Tr. 8). On cross-examination, however, respondent stated that he had obtained only "two or three" guns from Stewart in that manner (H. Tr. 9). He conceded further that he had told the postal inspector who had questioned him that he had found some of the guns he had sold in a sack in the back seat of his automobile and that he had not mentioned Stewart's name at that time. He explained that he had not disclosed Stewart's involvement earlier because Stewart "was a bad tomato" and "was liable to take a shot" at him (H. Tr. 9-10). Respondent did not specify at the hearing what exculpatory evidence his brother or Stewart might have provided.[4]

On October 8, 1975—following an aborted attempt by respondent to plead guilty to a misdemeanor[5]—

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[4] Postal Inspector Wellner was also a witness at the hearing and testified that evidence had been presented to the grand jury tending to show that persons in addition to respondent had been involved in the matters charged in the indictment (H. Tr. 21-22). The government earlier had informed the court that its theory of the case was that respondent had received the handguns referred to in the indictment from his son (H. Tr. 11).

[5] On August 8, 1975, respondent attempted to plead guilty to a superseding information charging him with having knowingly and willfully obstructed and retarded the passage of mail matter, in violation of 18 U.S.C. 1701. But during the hearing on the plea, respondent repeated his earlier statement about having found the handgun referred to in the information in an unmarked package in the back seat of his automobile. The government informed the court that "it's our position that if [respondent] didn't know it was mail matter then he cannot enter a plea of guilty to the offense" (Plea Tr. 32), and the court thereafter declined to accept the plea.

the district court entered an order dismissing all counts of the indictment. The court based its dismissal on Rule 48(b) of the Federal Rules of Criminal Procedure, stating in relevant part (App. D, *infra*, p. 14a):

> [A]s of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to [respondent's] alleged commission of the offenses charged against him, but did not charge [respondent] or present the matter to a grand jury until more than 17 months thereafter. * * *
>
> As a result of the delay [respondent] has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. The Government's delay has not been explained or justified and we find it unnecessary and unreasonable.

On February 23, 1976, a divided panel of the court of appeals affirmed the dismissal of the three possession counts of the indictment and ordered reinstatement of the count charging respondent with dealing in firearms without a license. The majority (comprised of Justice Clark and Judge Bright) rested its affirmance upon its finding that respondent had es-

tablished "the two basic elements essential to a claim of preindictment delay—unreasonable delay and prejudice to [his] ability to defend against the charges" (App. A, *infra*, p. 5a). Although the majority acknowledged that the delay had been occasioned by the government's desire to identify additional persons who may have participated in the thefts, it nevertheless concluded that the district court's finding that the delay was "unjustified, unnecessary, and unreasonable" was supported by the evidence (*ibid.*). With respect to the district court's finding of prejudice, the majority relied upon respondent's assertion—not made at or supported by the testimony at the hearing on the motion to dismiss—"that were Stewart's testimony available it would support his claim that he did not know that the guns were stolen from the United States mails" (*ibid.*).

Judge Henley dissented from the decision insofar as it upheld the district court's dismissal of the three possession counts, in part for the reasons stated in his dissenting opinion in *United States* v. *Barket*, 530 F. 2d 189, 197-199 (C.A. 8). Judge Henley stressed that "the fifth amendment protection against preindictment or preprosecution delays is not coextensive with the 'speedy trial' protection accorded by the sixth amendment" and that "the subject of a criminal investigation has no constitutional right to immediate prosecution or arrest" (App. A, *infra*, p. 8a). Judge Henley also pointed out that respondent had not offered any evidence tending to show that the delay in obtaining the indictment "was motivated by any sinister desire on the part of the

investigating officers or the United States Attorney to gain a tactical advantage * * *" (*id.* at 8a-9a).[6]

Judge Henley noted additionally that respondent's belated assertion of prejudice as a result of Stewart's death made that assertion highly suspect (*id.* at 9a-10a), and he concluded that, in any event, "the district court's finding that [respondent] sustained prejudice as a result of the death of Tom Stewart was purely speculative and for that reason was clearly erroneous" (*id.* at 9a). According to Judge Henley (*id.* at 11a):

> When a district judge sustains in advance of trial a motion to dismiss an indictment because of prejudicial pre-indictment delay, he takes a stringent measure. And if such a motion is improvidently granted, it adversely affects the public interest in the enforcement of the criminal law, and it also encourages the filing of meritless motions, similarly based, by other defendants. The dismissing of indictments on account of the government's delay in obtaining them is not an acceptable solution to the problem of crowded criminal calendars, and in my opinion motions such as [respondent's] should

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[6] In *Barket, supra*, Judge Henley had stated (530 F. 2d at 198):

> [P]rejudice conceded, my position in a case of this kind is that pre-prosecution delay does not amount to a denial of due process absent a showing of bad faith or improper motive on the part of the government in delaying the prosecution, or a showing of detrimental reliance by a putative defendant on the initial decision of the government not to prosecute.

not be granted in advance of trial except in clear cases.

REASONS FOR GRANTING THE WRIT

In *United States* v. *Marion*, 404 U.S. 307, this Court held that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge * * * engage the particular protections of the speedy trial provision of the Sixth Amendment" (404 U.S. at 320). At the same time, *Marion* acknowledged that pre-accusation delay might in some instances violate the Due Process Clause of the Fifth Amendment and require the dismissal of an indictment. Specifically, this Court referred approvingly to the government's suggestion that the Due Process Clause would require the dismissal of an indictment "if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to * * * [the accused's] right[ ] to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324; footnote omitted).

The decision below represents a marked departure from the criteria suggested by this Court in *Marion* for evaluation of due process claims such as respondent's. It also conflicts in several significant respects with decisions in other circuits dealing with the showing required of a defendant who alleges that pre-accusation delay has offended the Due Process Clause. Most importantly, in this and other recent cases the Eighth Circuit has dispensed with the requirement that a defendant claiming a due process violation because of pre-accusation delay show that the government sought the delay to secure an improper tactical advantage. Dismissal of an indictment is required, under the holdings of the Eighth Circuit, whenever the government fails adequately to justify a particular delay and the defendant is able to demonstrate that the delay prejudiced his ability to defend against the charges. By relieving defendants of any obligation to show that the delay in indictment or arrest stemmed from improper tactical considerations, the decision below ignores significant differences in the policies served by the Due Process Clause and the speedy trial provision of the Sixth Amendment.

Even assuming that the court of appeals was correct in dispensing with any requirement that respondent demonstrate improperly motivated delay as an element of his due process claim, we believe the court erred in attempting to assess that claim prior to trial. Both for reasons of judicial economy and because of the difficulty of evaluating inherently speculative allegations of prejudice without the benefit of the full record developed at trial, it is important that this Court make clear that claims of unconstitutional pre-accusation delay should be resolved—absent extraordinary circumstances—after trial.

1. The panel majority held in this case that the showing required of a defendant claiming a violation of due process because of pre-accusation delay is limited to "two basic elements"—a demonstration that

the delay was "unreasonable" and a showing that it prejudiced the defendant's ability to defend against the charges (App. A, *infra*, p. 5a). The majority then went on to hold that the delay that occurred here was "unreasonable" because "the essential facts underlying the indictment" were known to the prosecutor approximately seventeen months prior to respondent's indictment and "[n]o reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft of firearms from the United States mails" (*ibid.*). In an earlier case, *United States* v. *Barket*, *supra*, a panel of the Eighth Circuit had explained that a pre-accusation delay is "unreasonable" under the due process test announced in *Marion* whenever the defendant has been able to show that the delay was caused by "governmental negligence" (530 F. 2d at 195).

The Eighth Circuit's use in the present case and in *Barket* of a negligence standard in assessing the government's responsibility for pre-accusation delay under the Due Process Clause has little in common with the standard of tactically-motivated misconduct approved in *Marion*. In fact, in *Barket* the Eighth Circuit erroneously relied upon *Barker* v. *Wingo*, 407 U.S. 514. for the proposition that negligence or inadvertence by the government, delaying the obtaining of an indictment and prejudicing the defense, violates the Due Process Clause. *Barker* concerned only the right to a speedy trial under the Sixth Amendment, and the court's equation of the government's respon-

sibility before and after a person has been accused of a crime ignores significant differences in the policies served by the Due Process Clause and the speedy trial provision of the Sixth Amendment.

Once a person has been formally accused of a crime, the prosecution and the judiciary are obligated under the Sixth Amendment to proceed with "orderly expedition." *Smith* v. *United States*, 360 U.S. 1, 10. In assessing a Sixth Amendment claim, the finding that a particular delay was "unreasonable" is entitled to weight because the purpose of the speedy trial provision is "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself" (*United States* v. *Marion*, *supra*, 404 U.S. at 320; quoting from *United States* v. *Ewell*, 383 U.S. 116, 120).

Prior to formal accusation, however, the interests of a potential defendant and of a society concerned with the even-handed enforcement of the criminal laws are quite different. Given limited resources, prosecutors are constantly faced with the task of assigning priorities. It is unfair to characterize as prosecutorial "negligence" the decision to devote available resources to the investigation of some matters at the expense of others, and unrealistic to assume that the stringent measure of dismissing an indictment because of pre-accusation delay will lead to a significant lessening of the time between the commission of offenses and the bringing of indict-

ments—at least insofar as those delays stem from institutional, as opposed to malevolent, considerations. Non-invidious pre-accusation delays are properly tolerated where post-accusation delays would not be, in part because, as this Court pointed out in *Marion*, prior to arrest or charge "a citizen suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer" (404 U.S. at 321).

The approach of the court of appeals, however, is plainly rooted in the premise that the government has a duty to proceed expeditiously with the investigation and institution of criminal charges, and that a failure to proceed with satisfactory dispatch will render pre-accusation delay unreasonable. This view has serious import for the administration of criminal justice and leads the judiciary down a path that it has heretofore wisely eschewed. Here, for instance, the indictment was dismissed for pre-accusation delay despite the fact, acknowledged by the majority below (App. A, *infra*, p. 5), that the delay was caused by the government's efforts to identify persons in addition to respondent who may have participated in the offenses charged in the indictment.[7] The holding of the court of appeals does not square with this Court's observation in *Hoffa* v. *United*

[7] As noted above, the report submitted to the United States Attorney by Postal Inspector Wellner stated that respondent would not have had access in the normal course of his duties to the mail handling facilities of the Terminal Railroad Association. Although respondent's son did have access to those facilities and had cashed some of the checks that had been given in payment for the stolen handguns, the report further stated that the postal inspectors did not have any evidence showing that respondent's son was responsible for the thefts.

States, 385 U.S. 293, 310—quoted approvingly in *Marion* (404 U.S. at 325, n. 18)—that

> [t]here is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.[8]

A decision to delay presenting evidence to a grand jury pending further investigation often makes sense as well from the perspective of the individual suspected of having committed a crime. Further investi-

[8] See also *United States* v. *Watson*, No. 74-538, decided January 26, 1976. ("Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury.") (Powell, J., concurring, slip op. 6.)

gation may reveal that the person originally under suspicion was not involved or that no criminal offense was committed. See *United States* v. *Finkelstein*, 526 F. 2d 517, 526 (C.A. 2). In either event, the decision to delay seeking an indictment may thus serve to avoid placing the person in the position of having been publicly accused of criminal activity. Even if ultimately indicted, moreover, the delay may shorten the period between the formal bringing of charges and the defendant's opportunity to secure an acquittal on those charges at trial.

The question whether a defendant seeking dismissal of an indictment on grounds that he has been deprived of due process of law by pre-indictment delay must show that the delay was motivated by an attempt by the government to secure improper tactical advantage is one that has divided the courts of appeals. At least two other circuits appear to agree with the Eighth Circuit that a showing of improper motivation for the delay is not essential. *United States* v. *Wilson*, 517 F. 2d 1400 (C.A. 3); *United States* v. *Dukow*, 453 F. 2d 1328, 1330 (C.A. 3), certiorari denied *sub nom. Crow* v. *United States*, 406 U.S. 945; *United States* v. *Giacalone*, 477 F. 2d 1273, 1276-1277 (C.A. 6). On the other hand, at least four circuits do require such a showing. *United States* v. *Duke*, 527 F. 2d 386, 390 (C.A. 5); *United States* v. *Ricketson*, 498 F. 2d 367, 370-371 (C.A. 7); *United States* v. *Beitscher*, 467 F. 2d 269, 272 (C.A. 10); *United States* v. *Daley*, 454 F. 2d 505, 508

(C.A. 1).[9] This disagreement among the circuits is ripe for resolution by this Court,[10] particularly in light of the substantial practical impact of the holding below on the manner in which investigative and prosecutive functions are to be carried out.[11]

2. The decision below also departs from previously accepted standards by endorsing a procedure for resolving due process claims based upon pre-accusation delay that, in practical effect, significantly dilutes the requirement that the defendant demon-

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[9] The Second Circuit has expressly reserved ruling on the issue presented here (*United States* v. *Finkelstein, supra*), and there appears to be a conflict on the issue within the District of Columbia Circuit (compare *United States* v. *Bridgeman*, 523 F. 2d 1099, 1111-1112, with *United States* v. *Jones*, 524 F. 2d 834, 839-846).

[10] In each of the cases sustaining our position, the court also concluded that the defendant had failed to establish prejudice as a result of the pre-indictment delay, so that, strictly speaking, it is arguable that the statements regarding the cause of delay are only an alternative holding. Nevertheless, each of the courts has clearly expressed a view on the subject in direct conflict with the position of the court of appeals in the instant case.

[11] An additional difficulty inherent in the decision in this case is that it requires courts confronted with due process allegations based upon pre-accusation delay to determine the point at which the government possessed sufficient evidence to warrant submitting that evidence to the grand jury. In many cases, the making of such a determination would involve nearly insuperable problems. In almost all cases, moreover, lengthy hearings—similar in character to the trial itself—would be necessary before the required determination could be made with any assurance. See *United States* v. *Marion*, *supra*, 404 U.S. at 321, n. 13.

strate that the delay caused actual and substantial prejudice to his ability to defend against the charges. While it may sometimes be possible, and not unduly burdensome, for a court to determine with some assurance prior to trial whether the government sought to delay formal accusation to secure an improper tactical advantage, the same will seldom be true of allegations of defense prejudice. At a minimum, requiring the government to respond, prior to trial, to allegations that a particular delay impaired the accused's ability to defend against the charges will require a dress rehearsal of the trial itself. The resulting expenditure of judicial and prosecutorial resources, and the inevitable inconvenience to witnesses and others, is not required to vindicate the policies served by the Due Process Clause.

The dangers inherent in attempts to resolve due process claims prior to trial are, in fact, graphically illustrated by the decision below. At best, the majority's finding on the issue of defense prejudice rests upon unsubstantiated speculation concerning both the nature and strength of the government's case against respondent and respondent's anticipated defense.[12] Respondent made no effort at the hearing on his motion to dismiss to explain what information his brother or Tom Stewart might have provided that

[12] While we disagree with the conclusion that actual and substantial prejudice was established, we do not ask this Court to review that essentially factual conclusion, but rather the broader question of whether it was proper to arrive at such a conclusion as a result of a pre-trial hearing.

would have been favorable to his defense. In finding that respondent's ability to defend had been impaired by Stewart's death, the majority below relied upon respondent's contention—not made at or supported by the testimony at the hearing—that "were Stewart's testimony available it would support [respondent's] claim that he did not know that the guns were stolen from the United States mails" (App. A, *infra*, p. 5a).[13] But as Postal Inspector Wellner's report indicates, the person to whom respondent sold the guns (Joe Boaz) admitted during questioning that he had known that the guns were "hot" when he resold them. At trial, Boaz presumably would have been asked from whom he received that information and, since he had purchased the guns from respondent, the answer could well have shown that respondent also knew that the guns had been stolen.[14]

[13] To establish a violation of 18 U.S.C. 1708, the government need only have shown at trial that respondent knew that the guns had been stolen—not that they had been stolen from the United States mails. *Barnes* v. *United States*, 412 U.S. 837, 847.

[14] The Eighth Circuit apparently construes *Marion* as requiring courts to engage in "a process of balancing the reasonableness of the delay against any resultant prejudice to the defendant" (*United States* v. *Barket, supra*, 530 F. 2d at 193; quoting from *United States* v. *Jackson*, 504 F. 2d 337, 339 (C.A. 8), certiorari denied, 420 U.S. 964). Or, as explained in a more recent Eighth Circuit decision, "as the delay increases, the specificity with which prejudice must appear, diminishes" (*United States* v. *Naftalin*, No. 75-1692, decided March 30, 1976 (slip op. 6)). Although the majority did not in this case expressly state that it was balancing its assessment of prejudice against its assessment of

By countenancing resolution of respondent's due process claim prior to trial, the majority of the court below ignored the procedures suggested by this Court in *Marion*. In that case, as here, the defendants relied "solely on the real possibility of prejudice inherent in any extended delay; that memories will dim, witnesses become inaccessible, and evidence be lost" (404 U.S. at 325-326). This Court concluded, however, that while "[e]vents of the trial may demonstrate actual prejudice, * * * at the present time [defendants'] due process claims are speculative and premature" (*id.* at 326). The enhanced ability to make a sound assessment of claims of prejudice after trial, combined with the substantial economy of judicial and prosecutorial resources that will be accomplished by avoiding a lengthy pre-trial hearing that will inevitably be largely duplicative of the trial itself, prove the soundness of a rule, which we urge this Court to adopt, requiring that claims such as that of respondent normally be resolved after trial.

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the length or reasonableness of the delay, respondent's showing of prejudice fell far short of the showing that would have been required in other circuits to establish a violation of due process. See, *e.g.*, *United States* v. *McGough*, 510 F. 2d 598, 604 (C.A. 5) (mere allegation that several potential witnesses had died and the memories of others had faded held to constitute an insufficient showing of prejudice absent evidence of their potential utility to the defense); *United States* v. *Galardi*, 476 F. 2d 1072, 1075 (C.A. 9) (unexplicated claim that missing person might have been useful to the defense held insufficient); *United States* v. *Dukow*, *supra*, 453 F. 2d at 1330 (deaths of two potential witnesses insufficient to establish prejudice where the defense failed to show what their testimony would have been).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JUNE 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-1852

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE LOVASCO, SR., APPELLEE

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: January 16, 1976

Filed: February 23, 1976

Before CLARK, Associate Justice, Retired,* and BRIGHT and HENLEY, Circuit Judges.

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* TOM C. CLARK, Associate Justice, Retired, United States Supreme Court, sitting by designation.

BRIGHT, Circuit Judge.

The grand jury on March 6, 1975, indicted Eugene Lovasco, Sr., charging him with three counts of unlawful possession of handguns stolen from the mail, and one count of engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. §§ 922(a)(1) and 924(a). These indictments referred to eight handguns which Lovasco had possessed and then sold to a third party between July 25, 1973 and August 31, 1973, some 17 months before the indictment.

Prior to trial, Lovasco moved to dismiss the indictments because of prejudicial preindictment delay. The alleged offenses had been investigated by the postal inspector of the St. Louis, Missouri, post office department, between August 20, 1973, and October 2, 1973. During the investigation on September 26, 1973, a postal inspector interviewed Lovasco in the presence of his attorney and obtained a statement from him. The post office department sent a report of alleged offenses to the United States Attorney for the Eastern District of Missouri on October 2, 1973.

District Court Judge John K. Regan dismissed all counts of the indictment, noting that although the Government had possessed all of the information relating to the defendant's alleged commission of the offenses on or about October 2, 1973, it did not charge the defendant or present the matter to a grand jury until more than 17 months thereafter. The court concluded:

> As a result of the delay defendant has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. The Government's delay has not been explained or justified and we find it unnecessary and unreasonable.[1]

Upon our review of the record, we affirm the district court's dismissal of counts one, two, and three (alleging unlawful possession of stolen handguns), but direct reinstatement of count four (dealing in firearms without a license).

In testimony supporting his motion for dismissal, Mr. Lovasco repeated in substance the statement that he had earlier made to postal authorities to the effect that after visiting his son, Eugene, Jr., a mail handler at the Clark Avenue mail facility of the Terminal Railroad Association, he found a sack in the back of his car containing Browning automatic pistols. Lovasco added to that earlier statement by testifying that he had received two or three of the automatic pistols from one Tom Stewart, now deceased, who had worked for the Terminal Railroad as did Lovasco. Lovasco stated that he had not mentioned to the postal inspector investigating the case that he received some of the guns from Stewart because as he described Stewart, "this guy was a bad tomato, he was liable to take a shot at me if I told him."

Some other information relative to Mr. Lovasco having sold a gun to another party surfaced in

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[1] The court's order is unpublished.

March of 1975, but that additional evidence does not seem to be embodied in any of the counts of the indictment. The postal inspector in charge of the case testified that he would have recommended the prosecution of this case and presentation of the evidence to the grand jury based on the information contained in the report submitted to the United States Attorney on October 2, 1973.

The prosecuting attorney has indicated that the Government theorized that the guns in question had come from the accused's son, who worked at the post office, but no charges have been made against him. At oral argument the prosecutor indicated the delay in the prosecution resulted from awaiting results of further investigation which might have implicated the person or persons who may have stolen the mailed matter.

We discussed preindictment delay in *United States* v. *Jackson*, 504 F.2d 337 (8th Cir. 1974), where we noted:

> The Supreme Court in *Marion* [*United States* v. *Marion*, 404 U.S. 307 (1971)] recognized that pre-prosecution delay on the part of the Government may have violated defendant's right to due process of law under the Fifth Amendment, and specifically declared that the statute of limitations does not fully define the rights of criminal suspects to be speedily accused. [*Id.* at 339.]

We added:

> Our court, too, has often recognized that an unreasonable pre-accusation delay, coupled with prejudice to the defendant, may violate the Fifth Amendment, although we have yet to hold in any case that the prejudice was sufficient to require reversal. [*Id.* at 339 (citations omitted).]

Here, the trial court found the two basic elements essential to a claim of preindictment delay—unreasonable delay and prejudice to one's ability to defend against the charges. Although the essential facts underlying the indictment were known to the Government and to the prosecutor on October 2, 1973, no prosecution was initiated for 17 months. No reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft of firearms from the United States mails. The postal inspector had submitted a prompt report to the prosecutor with documentations of facts uncovered in the investigation. The district court deemed the delay unjustified, unnecessary, and unreasonable. That determination is supported by the evidence.

Lovasco testified that one Tom Stewart, who is now dead, sold him two of the firearms in question, and contends that were Stewart's testimony available it would support his claim that he did not know that the guns were stolen from the United States mails. In support of the motion to dismiss, Lovasco testified that Stewart died about six months prior to April 25, 1975. The Government concedes that Tom Stewart did exist and was employed by the Terminal Railroad. While the Government does not concede Stewart's death, it does not claim to have any evi-

dence that he is now alive. Thus, the record also supports the district court's finding that the defendant has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf.

These findings of unreasonable delay and prejudice support the dismissal of counts one, two, and three of the indictment, but do not support dismissal of count four.

The fourth count charges Lovasco with dealing in firearms without a license as required by federal law. According to the investigation report, one Joe Boaz, Jr., stated that he had purchased eight pistols from Eugene Lovasco, Sr. on various dates between July 26, and September 11, 1973. In the statement given to the postal inspector, Lovasco admitted selling four or five pistols that he had found in his car to Joe Boaz, Jr., but denied selling any other pistols to him. In his testimony before the district court on the motion to dismiss, the accused admitted finding a bag of pistols in the car and obtaining two other pistols from Tom Stewart. He added, "and Joe Boaz bought them over the telephone."

As we understand it, the fourth count relates solely to the transaction between Lovasco and Boaz. Since Tom Stewart was not a participant in that transaction and the question of whether the guns were stolen is irrelevant to the charge, it is difficult to perceive any prejudice to Lovasco's defense because of the death of Stewart. Significantly, counsel for appellee conceded at the hearing before the district court that the fourth count is independent of

the other three counts. While counsel contended the fourth count could not stand on its own, that issue is not before us.

Accordingly, we sustain the dismissal of counts one, two, and three of the indictment, but direct the reinstatement of count four.

HENLEY, Circuit Judge, Dissenting.

I agree with the majority that the fourth count of the indictment against the defendant should be reinstated. I respectfully dissent from the view of the majority that the order of the district court should be affirmed to the extent that it dismissed the first three counts of the indictment.

With respect to those counts, my view is that the action of the district court in dismissing the first three counts in advance of trial on the theory that the defendant suffered prejudice as a result of an unreasonable preindictment delay on the part of the government was clearly erroneous. In my opinion the district court at most should have done no more than reserve ruling on the motion and let the case proceed to trial. Had the defendant been acquitted, the question of preindictment delay would not have survived; had he been convicted the question might well have been presented in clearer focus post trial than that in which it was presented in advance of trial and on the defendant's motion to dismiss.

Very recently in *United States* v. *Barket*, —— F. 2d —— (8th Cir. No. 75-1320 Jan. 28, 1976), a

majority of a panel of this court affirmed an order of the United States District Court for the Western District of Missouri dismissing for preindictment delay an indictment returned in 1974 charging that in 1970 the defendant, a bank official, unlawfully made a contribution of bank funds to a political campaign and that in so doing he misapplied the funds of the bank. The indictment in that case was returned within the applicable statutory period of limitations which at that time was five years.

As a member of the panel, I dissented in that case and filed an opinion setting out my general views as to the proper application to individual cases of the general rule laid down in *United States* v. *Marion*, 404 U.S. 307 (1971). I see no occasion to restate those views here except to repeat and emphasize my opinion that the fifth amendment protection against preindictment or preprosecution delays is not coextensive with the "speedy trial" protection accorded by the sixth amendment, and again call attention to the fact that the subject of a criminal investigation has no constitutional right to immediate prosecution or arrest. *See Hoffa* v. *United States*, 385 U.S. 293, 310 (1966), cited with approval in *United States* v. *Marion*, *supra*, 404 U.S. at 325.

Here, as in *Barket*, there is no evidence that the delay of the government in obtaining the indictment against the defendant, which delay the district court found was unreasonable, was motivated by any sinister desire on the part of the investigating officers or the United States Attorney to gain tactical advan-

tage over the defendant by means of the delay or to prejudice him in his defense. Nor is there any evidence of any detrimental reliance by the defendant on the fact that although a statement was taken from the defendant in September, 1973 and a report to the United States Attorney was made by postal authorities in October of that year, defendant was not indicted until March, 1975.

Further, the delay involved in this case was much shorter than the delay involved in *Barket*, and the offense for which the defendant was ultimately indicted arguably may be considered as more serious and involving more moral turpitude than the offenses charged against Mr. Barket.

Apart from those considerations, I think that the district court's finding that the defendant sustained substantial prejudice as the result of the death of Tom Stewart was purely speculative and for that reason was clearly erroneous.

The record and the briefs disclose that the indictment was returned on March 6, 1975; on March 18, 1975 defendant filed his motion to dismiss; and a hearing was held on the motion on April 25, 1975. In his brief counsel for defendant states that his client testified that Stewart had died about six months prior to the hearing. If so, Stewart had ceased to be a source of danger to the defendant, if he ever was, when the motion was filed. Nevertheless, no mention of Stewart or his "lost testimony" is made in the motion, and there is no allegation of specific prejudice in the motion except the assertion

that the defendant had suffered "anxiety and concern" since his statement had been taken in 1973. The name of Stewart seems to have come up for the first time when the defendant testified in support of his motion. In the circumstances, one may suspect that the claim of prejudice based on the death of Stewart was nothing but a fabrication, and that had Stewart been alive the defendant could just as well have relied on the recent death of any other of his acquaintances, claiming that he had innocently acquired the pistols from that acquaintance.

Defendant made no specific showing as to what he would have proved by Stewart had the latter been available, and in fact defendant made no showing that Stewart would have taken the stand in defendant's behalf had Stewart been alive and subject to subpoena.

Had Stewart taken the stand and undertaken to exculpate the defendant, he doubtless would have been required to explain his own connection, if any, with the pistols in question, and that connection may well have been highly culpable. The defendant could not have compelled Stewart to incriminate himself, and it is unrealistic to believe that Stewart would have done so voluntarily simply to aid or accommodate the defendant.

If the defendant had been put to trial, it would have been open to him to contend before the jury that he had acquired the pistols from Stewart without any guilty knowledge and to urge upon the jury the fact that Stewart's death had deprived defendant of the

benefit of Stewart's testimony. As it is, the defendant simply goes free without trial.

When a district judge sustains in advance of trial a motion to dismiss an indictment because of prejudicial pre-indictment delay, he takes a stringent measure. And if such a motion is improvidently granted, it adversely affects the public interest in the enforcement of the criminal law, and it also encourages the filing of meritless motions, similarly based, by other defendants. The dismissing of indictments on account of the government's delay in obtaining them is not an acceptable solution to the problem of crowded criminal calendars, and in my opinion motions such as that of the defendant should not be granted in advance of trial except in clear cases.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1975

No. 75-1852

THE UNITED STATES, APPELLANT

vs.

EUGENE LOVOSCO, SR., APPELLEE

Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

This cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the dismissal of the said District Court of Counts One, Two and Three in this cause is hereby affirmed in accordance with the majority opinion of this Court.

And it is further ordered by this Court that Count Four (dealing in firearms without a license) be and is hereby reinstated with the majority opinion of this Court.

February 23, 1976

A true copy.
Attest:

/s/ Robert C. Tucker
Clerk
U. S. Court of Appeals
8th Circuit
April 28, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1975

75-1852

THE UNITED STATES, APPELLANT

v.

EUGENE LOVASCO, SR., APPELLEE

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 21, 1976

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-66 CR (2)

UNITED STATES OF AMERICA, PLAINTIFF

v.

EUGENE LOVASCO, SR., DEFENDANT

ORDER

This matter is before the Court on motion of defendant to dismiss the indictment under Rule 48 (b), F.R.CR. P.

A hearing was held on the motion. The evidence disclosed and we find that as of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to defendant's alleged commission of the offenses charged against him, but did not charge defendant or present the matter to a grand jury until more than 17 months thereafter. The indictment was returned March 6, 1975.

As a result of the delay defendant has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. The Government's delay has not been explained or justified and we find it unnecessary and unreasonable.

Accordingly, IT IS HEREBY ORDERED that defendant's motion be and the same is hereby SUSTAINED, and the indictment is hereby dismissed.

/s/ John K. Regan
United States District Judge

Dated this 8th day of October, 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 209374 266

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-1844

UNITED STATES OF AMERICA,
Petitioner

—v.—

EUGENE LOVASCO, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 21, 1976
CERTIORARI GRANTED OCTOBER 12, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1844

UNITED STATES OF AMERICA,

Petitioner

—v.—

EUGENE LOVASCO, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 6, 1975. Indictment filed and arrest warrant issued; order filed fixing bond in the amount of $1,000.00.

March 10, 1975. Defendant waives reading of indictment; enters plea of not guilty to indictment; passed for trial setting; released on existing bond.

March 12, 1975. Marshal's return of arrest warrant; executed on March 7, 1975.

March 13, 1975. Appearance bond in the amount of $1,000.00 filed.

March 18, 1975. Defendant's motion to dismiss indictment filed.

Government's response to defendant's motion to dismiss indictment filed.

March 19, 1975. Oral argument requested on defendant's motion to dismiss indictment.

March 21, 1975. Defendant's suggestions in reply to government's response filed.

April 25, 1975. Defendant's motion to dismiss indictment heard, argued and submitted.

August 8, 1975. Defendant signed waiver of indictment and consented to proceedings by information; proceedings passed to further order.

September 8, 1975. Defendant's motion to dismiss indictment heard, argued and submitted.

October 8, 1975. Order of the district court dismissing indictment filed.

November 6, 1975. Notice of appeal filed.

April 29, 1976. Order of the court of appeals filed affirming the dismissal of Counts One, Two and Three and reinstating Count Four.

May 4, 1976. Cause set for trial on May 10, 1976.

May 10, 1976. Trial continued to further order of the court.

June 21, 1976. Petition for writ of certiorari filed.

October 12, 1976. Petition for writ of certiorari granted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Filed Mar. 6, 1975, William D. Rund, Clerk,
U. S. District Court, E. District of Mo.]

No. 75-66 CR(2)

UNITED STATES OF AMERICA, PLAINTIFF

v.

EUGENE LOVOSCO, SR., DEFENDANT

The Grand Jury charges:

That on or about the 25th day of July, 1973, in the City of St. Louis, in the State of Missouri, within the Eastern District of Missouri,

EUGENE LOVOSCO, SR.

the defendant, did unlawfully have in his possession certain mail matter and an article contained therein, to wit, one Browning Arms .380 caliber semi-automatic pistol, bearing serial number 72N18184, which said mail matter had been addressed to Montgomery Ward Store No. 1555, 2875 East Charleston, Las Vegas, Nevada 89104, and had theretofore been stolen, taken and abstracted from and out of the United States mail; he, the said defendant, at the time of unlawfully having said pistol in his possession well knowing the same to have been stolen.

In violation of Section 1708, Title 18, United States Code.

—SECOND COUNT—

The Grand Jury further charges:

That on or about the 27th day of July, 1973, in the City of St. Louis, in the State of Missouri, within the

Eastern District of Missouri, EUGENE LOVOSCO, SR. the defendant, did unlawfully have in his possession certain mail matter and an article contained therein, to wit, one Browning Arms .380 caliber semi-automatic pistol, bearing serial number 72N19524, which said mail matter had been addressed to Pony Express Sport Shop, 17460 Ventura Blvd., Encino, California 91316, and had theretofore been stolen, taken and abstracted from and out of the United States mail; he, the said defendant, at the time of unlawfully having said pistol in his possession well knowing the same to have been stolen.

In violation of Section 1708, Title 18, United States Code.

—THIRD COUNT—

The Grand Jury further charges:

That on or about the 31st day of August, 1973, in the City of St. Louis, in the State of Missouri, within the Eastern District of Missouri, EUGENE LOVOSCO, SR., the defendant, did unlawfully have in his possession certain mail matter and articles contained therein, to wit, three Browning Arms .380 caliber semi-automatic pistols, bearing serial numbers 72N20174, 72N20173, 72N19984, and three Browning Arms 9 millimeter semi-automatic pistols, bearing serial numbers 73C77513, 73C78482 and 73C79681, which said mail matter had been addressed to The Sportsman, 350 North Virginia Street, Reno, Nevada 89501, and had theretofore been stolen, taken and abstracted from and out of the United States mail; he, the said defendant, at the time of unlawfully having said pistols in his possession well knowing the same to have been stolen.

In violation of Section 1708, Title 18, United States Code.

—FOURTH COUNT—

The Grand Jury further charges:

That from on or about the 25th day of July, 1973, to on or about the 31st day of August, 1973, in the Eastern District of Missouri, EUGENE LOVOSCO, SR.

did knowingly engage in the business of dealing in firearms, without having been licensed to do so under the provisions of Chapter 44, Title 18, United States Code.

In violation of Sections 922(a)(1) and 924(a), Title 18, United States Code.

A True Bill.

/s/ John Klosterhoff
Foreman

/s/ Richard E. Coughlin
Asst. United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Filed Mar. 18, 1975, William D. Rund, Clerk,
U. S. District Court, E. District of Mo.]

No. 75-66 CR(2)

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

EUGENE LOVASCO, SR., DEFENDANT.

MOTION TO DISMISS INDICTMENT

Comes now the defendant and moves the Court to dismiss the indictment under Rule 48 of the Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States in that:

1. The defendant was interviewed on September 26, 1973 in the presence of his attorney, and gave a statement to the Government. To defendant's knowledge, the Government has obtained no new information or witnesses relating to any of the matters presented by the Government to the defendant on September 26, 1973.
2. The Government has waited until March 6, 1975, to present the matters relating to defendant to the Grand Jury, which is a total period of approximately 18 months.
3. There has been an unreasonable delay in the presentation of this matter to the Grand Jury.
4. There was no reason or excuse for the delay by the Government in its presentation to the Grand Jury.
5. Defendant has subsequent to his statement to the agents, called an agent and asked him what was occurring. That he has experienced anxiety and concern since his statement was taken.
6. Defendant has been prejudiced by the delay in the presentment to the Grand Jury.

7. Defendant has further not waived any of his rights to a speedy trial which is granted under Rule 48 as well as the Sixth Amendment to the Constitution of the United States.

/s/ Louis Gilden

/s/ Doreen D. Dodson
LOUIS GILDEN
and
DOREEN D. DODSON
Attorneys for Defendant
722 Chestnut Street
St. Louis, Missouri 63101
241-6607

PROOF OF SERVICE

The undersigned certifies that a complete copy of this instrument was served upon the attorney of record of each party to the above actually enclosing the same in envelopes addressed to the attorneys at their business address as disc'osed in the pleadings of record herein, with first-class postage fully prepaid, and by depositing said envelopes in a U. S. Post Office mailbox in St. Louis, Missouri, on the 19th day of March, A.D. 1975.

/s/ Patty Gayda

[2] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-66CR (2)

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

EUGENE LOVASCO, SR., DEFENDANT.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that on the 25th of April, 1975, the following proceedings were had before

THE HONORABLE JOHN K. REGAN, JUDGE,

United States District Court, Eastern District of Missouri, Eastern Division, presiding in Court Number Two.

APPEARANCES:

The United States of America appeared by Richard Coughlin, Assistant U. S. Attorney.

The Defendant appeared by Louis Gilden, Esq.

WHEREUPON, the following proceedings were had and entered of record:

[3] THE COURT: Okay, Mr. Gilden.

MR. GILDEN: Would you mark these?

(Whereupon, Defendant's Exhibit A marked for identification as requested.)

MR. GILDEN: Your Honor, may I proceed?

THE COURT: Yes.

MR. GILDEN: Your Honor, in support of my motion I would like to file Defendant's Exhibit A which is a Post Office Department, Postal Inspector's report dated—

THE COURT: September 26, 1973?

MR. GILDEN: No, the report is dated I think in October but the statement that was taken from my client was September 26, 1973, and that is reflected in this statement that was given to me by the Government.

I have talked to Mr. Coughlin and there may be some other stipulated facts in this matter that my client Mr. Lovosco talked to Mr. Wellner of the Postal Inspector on some five or six occasions after the statement was taken by the Postal Inspector and asked questions about what the Government intended to do in the matter and expressed his interest in whether there was going to be a prosecution in the matter.

[4] The other stipulation, Your Honor, is that Mr. Coughlin has informed me that since the statement was taken on September 26, 1973, that the only additional work the—the only additional witness the Government had was in January of 1975, a witness who allegedly was offered the purchase of a gun and that said purchase did not take place. But there was another witness allegedly who was sold a gun by the Defendant. But that crime is not a charge before this Court and would not be a matter of evidence before this Court. It's not one of the allegations.

MR. COUGHLIN: Your Honor, in regard to the previous mentioned stipulations by Mr. Gilden there is only one slight difference as far as we are concerned. The three, four, five or six conversations with Mr. Wellner were not in—per se in regard to this particular case but the comments as to what is happening in my case came along afterwards.

Furthermore, as to the additional witnesses received after the date of September 26, 1973, that is true as to witnesses but not the investigation itself. That's as far as our stipulation—

THE COURT: I'm not sure what you are saying?

MR. COUGHLIN: That there were no witnesses found after that date, no additional witnesses except for one and the item referred to, although Mr. Gilden claimed that it is not going to be evidence in this case our position is that [5] it would be evidence in this case. It's an additional firearm, an additional mail matter at a previous period of time which we feel would be evidence in this case as intent, knowledge, common scheme.

EUGENE LOVOSCO, SR.

having been produced, sworn and examined on his own behalf testified as follows:

DIRECT EXAMINATION

BY MR. GILDEN:

Q Will you please state your name?
A Eugene Lovosco.
Q And you are the Defendant in this case?
A Sir?
Q You are the Defendant in this case?
A Yes, sir.
Q Mr. Lovosco, calling your attention to the period after September 26, 1973, did you call Mr. Wellner?
A I called him several times and give him things but that's about all.
Q What did you discuss?
A Well, I asked him how things were coming out. He said he didn't know as yet, he would let me know is all the answer I would get.
[6] Q Were you concerned about it, a possible indictment?
A Very much so.
Q Were you anxious about it?
A That's right.
Q Did it affect you in any way?
A Well, I was working nights and I didn't get much sleep over it. I worried about it.

Q You were a switchman with the Terminal Railroad?
A Terminal Railroad.
Q You are retired now?
A 33 years, yes.
Q Now, since September 26, '73, sir, have any of your witnesses died, possible witnesses died?
A Yes.
MR. GILDEN: Mr. Joe Boaz, Your Honor, is listed as a possible witness for the Government here and allegedly he was a person who received some guns.
Q (Mr. Gilden) I will ask you this, Mr. Lovosco: is Mr. Joe Boaz employed by Florissant Dodge?
A That's right.
Q And was your brother employed by Florissant Dodge?
A Yes.
[7] Q Is his name Tom Lovosco?
A Yes, sir.
Q And was Tom Lovosco present during any and all transactions?
A All transactions, yes.
Q And is your brother now deceased?
A He is deceased, yes.
Q When did he die?
A April last year.
Q April of '74?
A '74.
Q He died of cancer, did he not?
A That's right.
Q And was he also a person who introduced you to Mr. Boaz?
A He introduced me to him. That's the first time I ever met him.
Q They were both car salesmen at Florissant Dodge?
A Both of them, yes.
Q Now, a Mr. Tom Stewart is he deceased at this time?
A He was a switchman, too.
Q Would he have been possibly a witness in this [8] proceeding?

A Well, I would have to say that I got some of the guns from him because I called him up on the telephone, see, from Mr. Joe Boaz's office at Florissant Dodge.

Q Now, is Mr. Stewart—is he alive or deceased?

A No, sir, he's not. He died about six months ago.

Q He died about six months ago?

A Yes, sir. He was fired from the Terminal on August the 30th—no, March the 30th, 1973, for drinking.

MR. GILDEN: I have no further questions.

CROSS EXAMINATION

BY MR. COUGHLIN:

Q Mr. Lovosco, September 26, 1973, or thereabouts you gave a statement to Paul Wellner, is that correct?

A Sir?

Q You gave a statement to Paul Wellner, is that correct, on that date?

A That's right, sir.

Q And you have been in contact with Mr. Wellner on several occasions since that time, is that correct?

A That's right.

Q Isn't it a fact that many of these conversa- [9] tions involved information you had concerning possible thefts at the postal facility?

A That's right.

Q Now, you have stated that Mr. Tom Lovosco is now dead; that was your brother, is that correct?

A That was my brother.

Q Was he a witness to your attaining any of these weapons?

A No. He was a witness—he heard over the telephone that I would call up. I'd call Tom Stewart over the telephone.

Q And Mr. Tom Stewart is the man you received the guns from, is that correct?

A Sir?

Q Mr. Stewart is a man that you received guns from, is that correct?

A Yes. I believe I got two or three of them over the telephone for Joe Boaz.

Q Now, I refer you to your statement of the 26th of September, 1973. Did you at any time tell Mr. Wellner that that's where you received your weapons, from a Mr. Tom Stewart?

A No, I didn't. I was kind of afraid because this guy was a bad tomato, he was liable to take a shot at me [10] if I told him.

Q At that time you told him you received four or five Browning pistols, you found them in a sack in your unlocked automobile, is that correct?

A My car was always unlocked at 11th Street District.

THE COURT: The question was whether you told him that?

THE WITNESS: I told him that.

Q (Mr. Coughlin) And you said four or five pistols, is that correct?

A I don't know how many that was in there that was in a bag.

Q Did Mr. Wellner ever question you as to the source of your guns other than that?

A No. The only thing he asked me where I got them at. I told him they was in the back end of my automobile.

Q Didn't he allege to you that you received them from your son, Mr. Lovosco?

A Oh, yes. He mentioned my son but I didn't get them from my son.

Q Isn't it a fact that you told him that you would do anything to protect your son?

A Well, yes, if he was in trouble, sure.

[11] MR. GILDEN: That's beyond the scope of this interrogation.

MR. COUGHLIN: Your Honor, our theory of this case is that the guns came from this man's son who worked at the Post Office. This man had made a statement that he received the guns and this is the first time this statement has come up that he received the guns from somebody else. I think it is very pertinent that

this man has stated before that he will do anything to protect his son in this case.

MR. GILDEN: I think it's beyond the scope of this motion.

THE COURT: No, he may answer.

Q (Mr. Coughlin) Isn't it a fact that you made that statement, sir?

A I might have made that statement because we got into an argument with Mr. McPherson in the office up there. He called me a—well, I can't say it in here.

THE COURT: You can say it here.

THE WITNESS: He told me I was a damn liar and everything else, see?

Q (Mr. Coughlin) Are you talking about Harold McPherson?

A I don't know what his first name is. His last name is Mr. McPherson. Mr. Wellner was there during the time [12] we argued about it and he said I was protecting my son. I said I'm not but I said—we got to talking and I said don't you protect your son? He wouldn't answer me. I said well, if your son was in trouble you would back him up. He wouldn't answer me. We got in an argument and he called me a damn liar and that was the end of it.

Q Mr. Lovosco, but you did not tell Mr. Wellner the source of your guns at that time or at any other time, is that correct?

A That's right. The only thing I told him I found those guns in the car.

MR. COUGHLIN: That is all I have of this witness, Your Honor.

THE COURT: Well, is it a fact you didn't find them in your car?

THE WITNESS: I did, yes, sir. A bag full of them in the car and the other two I got from Tom Stewart—two or three whichever that might have been. And Joe Boaz bought them over the telephone.

THE COURT: You are charged with—

THE WITNESS: About eight of them I believe on that paper that I had. Six at one time.

THE COURT: There is only four counts here. One is a Browning .380 that was bound for Montgomery Ward. [13] Another one was going to Pony Express Sport Shop in Encino. And the next one, three Browning semi-automatic pistols—

MR. GILDEN: There are eight altogether. Count three contains six, Your Honor, plus the two, one each in count one and count two.

THE COURT: Of course, how would any of that have to do with the fourth count, Louie?

MR. GILDEN: It wouldn't have. I think the fourth count is independent of the other three counts.

THE COURT: I mean if I were to dismiss.

MR. GILDEN: I agree, I think the fourth count would not stand by itself.

THE COURT: Step down.

(Witness excused.)

THE COURT: Do you have any other witnesses?

MR. GILDEN: No further witnesses.

THE COURT: You have any witnesses, Mr. Coughlin?

MR. COUGHLIN: Yes, Your Honor, I will.

[14] G. P. WELLNER

having been produced, sworn and examined on behalf of the Government, testified as follows:

DIRECT EXAMINATION

BY MR. COUGHLIN:

Q Would you state your name, sir?

A G. P. Wellner.

Q And what is your business or occupation?

A Postal Inspector.

Q And you are the case agent in the case of United States versus Eugene Lovosco, Sr., is that correct?

A That's correct.

Q And you have been the case agent from the beginning of this case, is that correct?

A Yes, sir.

Q And what was the date you talked to Mr. Lovosco concerning this case the first time?

A September 26, 1973.

MR. COUGHLIN: Would you mark these?

(Whereupon, Government's Exhibits 1, 2 and 3 marked for identification as requested.)

[15] Q (Mr. Coughlin) Mr. Wellner, since that date on how many occasions have you had an opportunity to talk to Mr. Lovosco?

A On several occasions.

THE COURT: What does several mean?

THE WITNESS: I would say approximately five to six occasions he has called by office.

Q (Mr. Coughlin) And during these occasions—at your office or on the phone?

A At the office on the phone, by phone at the office.

Q Let me show you what has been marked Government's Exhibit Number 1, 2 and 3. I will ask you if you have ever seen those items before?

A Yes, I have.

Q And what are those items?

A These are canceled personal checks payable to Gene Lovosco by Joe L. Boaz, Jr.

THE COURT: By whom?

THE WITNESS: Joe L. Boaz, Jr. The checks are dated July 26, July 31, and this last check is—apparently bears a date of August 31. It has had some manipulation on it.

Q (Mr. Coughlin) It has had some manipulation of that particular check, is that correct?

[16] A Yes.

Q First of all, where did you receive those items?

A I received these from Joe L. Boaz, Jr.

Q To your knowledge has Mr. Lovosco ever seen those items?

A I believe during our interview with Mr. Lovosco these checks were shown and the subject was brought up

anyway and at that time he stated that some of the checks went to his son; his son cashed some of the checks I believe is correct.

Q Now referring to the endorsement on the back of those checks, is that what you are referring to, sir?

A Yes.

Q And did he tell you what his son's name was?

MR. GILDEN: Your Honor, I don't understand the line of interrogation. We are not trying a lawsuit unless he can tie it up with the motion.

THE COURT: I don't know what it is either but let's find out.

Q (Mr. Coughlin) Are you familiar with the name of Mr. Lovosco's son?

A Yes, sir.

Q And what is his name, sir?

A Gene Lovosco.

Q And to your knowledge do you know where Gene [17] Lovosco works, sir?

A Yes, sir.

Q And where does he work?

A He works for the Terminal Railroad Association.

Q Now, as far as the guns are you familiar with the guns alleged in this indictment?

A Yes, sir.

Q Do you have any knowledge through your investigation as to where these guns were stolen from?

A Where they were possibly stolen?

Q Possibly stolen.

A Yes.

Q Where would that be?

A In the normal course of handling at the Terminal Railroad Association.

Q Now, Mr. Wellner, during the period of time you had talked with Mr. Lovosco has he at any time given you any further information as to the source of his weapons?

A Subsequent to our—

Q Subsequent to September 26, 1973.

A No, sir.

Q Now, the conversations that you have had with him since that date, do they deal strictly with the allegations contained in this particular indictment?
[18] A No, sir.
MR. COUGHLIN: That is all I have of this witness.

CROSS EXAMINATION

BY MR. GILDEN:

Q Mr. Wellner, did he ever tell you that he wanted to know what was going to happen with respect to his statement to you?
A Yes, he did.
Q And did he express concern over that to you?
A Yes, sir.
Q Mr. Wellner, you have seen Defendant's Exhibit A which is your report, have you not?
A Yes, I have.
Q Now, subsequent to October 2, 1973, have you gained any new information relating to Mr. Lovosco, any matters concerning him? This Mr. Lovosco here.
A Subsequent to—
Q October 2, 1973?
A Yes, sir.
Q What did you receive?
A Information was received that an individual was arrested in Texas with possession of a Sterling .22 caliber [19] pistol. Subsequent investigation disclosed that this pistol had been sold in a barber shop in Bellefountain, Missouri, by a Mr. Lovosco to a dentist. An interview of this dentist discosed this information.
Q When did you receive that information, do you know?
A The early part of March.
Q Of this year?
A Yes.
Q March of this year. Sir, calling your attention to the period October 2, 1973, did you at that time recommend presenting the matter to the Grand Jury related to Mr. Lovosco, Sr.?

A I submitted the information to the United States Attorney.
Q And did you supply any supplemental material to the U.S. Attorney besides Defendant's Exhibit A for presentation to the Grand Jury?
A I recall that there was checks attached to that.
Q Well, look at that. There are checks attached I believe. I'm not sure but I thought there was. If they are not then I'm sorry. I don't have the checks but there would be checks in addition to your statement.
A Yes.
[20] Q But they would have been the product of this investigation dated October 2, 1973, is that correct?
A Yes, sir.
Q And you would have submitted this entire report and you did to the U.S. Attorney, did you not?
A That is correct.
Q And have you supplied any supplemental material to him other than this report entitled Defendant's Exhibit A plus the checks that would be supportive of your investigation?
A Nothing in written form.
Q Now, would it be fair to say, Mr. Wellner, that without this evidence that you received in March of '75 you would have still recommended the prosecution of this matter and presentation to the Grand Jury?
A Without the evidence?
Q That you received in March of this year, this additional gun that you said was found in Texas.
A Would I have still recommended—
Q Yes.
MR. COUGHLIN: Your Honor, I might stipulate to this. This matter was on the docket for the Grand Jury before we received this information. We were going to the Grand Jury without that information.
[21] THE COURT: In March?
MR. COUGHLIN: In March. I received the information the morning of the Grand Jury itself; therefore we had gone to the Grand Jury.
MR. GILDEN: I have no further questions.

REDIRECT EXAMINATION

BY MR. COUGHLIN:

Q Very briefly, Mr. Wellner. You have dealt with Mr. Adelman and myself concerning this case from the U.S. Attorney's office, is that correct?

A That's correct.

Q On how many occasions have you been to discuss this case with us?

A I would say four or five occasions.

Q Now, this particular case as to these particular weapons involves other individuals, does it not?

A That is correct.

Q And to your knowledge has any information been presented to the Grand Jury in regard to this case other than the indictment, the day of the indictment itself?

A This one passed most recent indictment?

Q The most recent indictment?

A Yes, there was.

[22] Q And we have discussed this on several occasions, is that not correct?

A That is correct.

MR. COUGHLIN: That is all I have.

MR. GILDEN: I have no further questions.

THE COURT: Step down.

(Witness excused.)

THE COURT: Is that all the information?

MR. GILDEN: That's all I have.

MR. COUGHLIN: That is all the Government has at this time.

THE COURT: It will be submitted.

DEFENDANT'S HEARING EXHIBIT A
POST OFFICE DEPARTMENT
POSTAL INSPECTOR
Saint Louis, Missouri 63166

G. P. Wellner
Inspector

Case No. 3543652-SD(P)

October 2, 1973

SAINT LOUIS, MISSOURI: Violation Title 18, Section 1708, United States Code, by Martin Richard Koehnken, Joe L. Boaz, Jr., and Eugene Lovasco, Sr., for possession of stolen mail matter.

Honorable James E. Reeves
United States Attorney
Eastern District of Missouri
1114 Market Street
Saint Louis, Missouri 63101

Attention: Mr. David W. Harlan
First Assistant United States Attorney

Dear Mr. Reeves:

Herewith are particulars relating to the possession of stolen mail matter as discussed with Mr. Harlan on September 28, 1973. Mr. Harlan requested that this letter be submitted giving full details for consideration of prosecution.

NAME OF OFFENDER:	Eugene Lovosco, Sr.
ALIAS:	None
DATE OF BIRTH:	July 16, 1910
RACE:	Caucasian
ADDRESS:	1123 Astoria Drive, Saint Louis, MO 63137

OCCUPATION: Switchman, Terminal Railroad Association

PLACE OF OFFENSE: Saint Louis, Missouri

ACCOMPLICES: Joe L. Boaz, Jr., Martin Richard Koehnken and David L. Northdruft

DATES OF OFFENSE: On various dates between July 26 and September 11, 1973.

NATURE OF OFFENSE: Possession of stolen mail matter, to wit, eight Browning Arms hand guns mailed by Browning Arms Company, Arnold, Missouri, on July 25, July 27, and August 31, 1973. Mailing particulars and serial numbers of hand guns contained in each insured parcel will be shown under Details of Offense.

DETAILS OF OFFENSE

On August 20, 1973, ATF Special Agent Clark M. Young purchased a Browning .380 caliber semi-automatic pistol bearing Serial No. 72N19524 from David L. Northdurft, 8628 Park Crestwood Apartments, Crestwood, Missouri, for $100.00 cash. Northdruft is a salesman for Don Essen Chevrolet Company, Manchester, Missouri. Contact with Browning Arms Company disclosed this pistol was contained in a parcel mailed under Insured No. 7314339 on July 27, 1973, and was addressed to Pony Express Shop, 17460 Ventura Blvd., Encino, California. Contact with the addressee disclosed that the pistol was not contained in the parcel upon receipt. Subsequent interview of Northdurft by AFT Agents disclosed that he had purchased this firearm from Martin Richard Koehnken on August 5, 1973.

On August 23, 1973, ATF Special Agents Haro'd K. McPherson and James K. Watkins purchased a Browning Arms .380 caliber semi-automatic pistol bearing

Serial No. 72N18184 from Martin Richard Koehnken for $135.00 cash. Koehnken was also a salesman for Don Essen Chevrolet Company, Manchester, Missouri. Contact with Browning Arms Company disclosed that this pistol was contained in a parcel mailed under Insured No. 7314138 on July 25, 1973, and was addressed to Montgomery Ward Store, 2875 East Charleston, Las Vegas, Nevada. Contact with the Montgomery Ward Store disclosed that this pistol has not been received.

On September 5, 1973, Special Agents McPherson and Watkins purchased a Browning .380 caliber semi-automatic pistol bearing serial number 72N29174 for $135.00 and one Browning 9 millimeter semi-automatic pistol bearing serial number 73C78482 for $155.00. On September 11, 1973, Special Agents McPherson and Watkins seized two Browning 9 millimeter semi-automatic pistols bearing serial numbers 73C79681 and 73C77513 and two .380 caliber semi-automatic pistols bearing serial numbers 72N19984 and 72N20173 incident to the arrest of Martin Richard Koehnken for unauthorized dealing of firearms without obtaining a Federal Firearms License. Contact with Browning Arms Company disclosed that the pisto's recovered from Koehnken on September 5 and 11, 1973, were contained in a parcel mailed under Insured No. 7318111 on August 31, 1973, to The Sportsman, 350 North Virginia, Reno, Nevada. This insured parcel was never received by the addressee.

On September 12, 1973, Martin Richard Koehnken appeared before the United States Magistrate at Saint Louis, Missouri, on a charge of violation of Title 18, United States Code, Section 922(A)(1). Koehnken entered a plea of guilty on September 28, 1973, in United States District Court to a charge of dealing in firearms without a Federal Firearms Permit.

Subsequent to Koehnken's apprehension, investigation disclosed that he had purchased the eight firearms from Joe L. Boaz, Jr. Boaz was interviewed on September 24, 1973. He was advised of his Rights under Miranda and signed the standard warning and waiver form. Boaz

readily admitted that he had purchased the eight pistols from Eugene Lovosco, Sr., on various dates between July 26 and September 11, 1973. Boaz admitted that he knew these guns were "hot" and that he had sold them to Martin Richard Koehnken. Boaz denied any monetary gain in the transactions. Transmitted with this report is a copy of a sworn statement submitted by Boaz together with photocopies of four cancelled checks payable to Lovosco in payment of the handguns.

Eugene Lovosco, Sr., was interviewed on September 26, 1973, in the presence of his attorney, Louis Gilden. Lovosco stated that he was a Switchman for the Terminal Railroad Association. Lovosco stated that about September 1, 1973, he had visited his son, Eugene, Jr., a Mail Handler at the Clark Avenue Mail Facility of the Terminal Railroad Association. After completing the visit, he returned to his unlocked automobile and found a sack containing four or five Browning pistols. He alleged that some unknown person had apparently placed them there while he was visiting his son. He kept the pistols for a few days and then sold them to Joe Boaz. Lovosco denied selling all eight pistols to Boaz. Lovosco admitted that three of the cancelled checks payable to him by Joe Boaz bearing dates of July 26, July 31, and August 31, 1973, represented partial payment of pistols. Lovosco would not have access to the aforementioned insured parcels in the normal course of his duties as a switchman.

Eugene Lovosco, Jr., was interviewed on September 26, 1973. He stated that he had no knowledge that his father was dealing with Browning handguns. He admitted endorsing and cashing three of the aforementioned Boaz checks which he explained was at his father's request. Eugene Lovosco, Jr., is employed as a Mail Handler at the Clark Avenue Facility and would have access to the insured parcels in the normal course of his duties. He denied any responsibilities for the theft of these parcels. There is no evidence at this time that he is responsible for the depredations.

PERSONAL AND CRIMINAL HISTORY

Eugene Lovosco, Sr., was born on July 16, 1910, at Saint Louis, Missouri. He is married and has three adult children. He has an eighth grade education and has been continuously employed by the Terminal Railroad Association since August 16, 1943. He denied any prior arrest record.

Joe L. Boaz, Jr., is 29 years of age, married and lives at 2460 Furlong, Florissant, Missouri. He is employed as a salesman for Florissant Dodge and reported that he was a part-owner of the Image Lounge, 26 Wildwood Plaza, Saint Louis, Missouri.

WITNESSES AND THEIR TESTIMONY

Robert Clark, General Manager, Browning Arms Company, Route 1, Arnold, Missouri, telephone number AT 7-6800, can produce company records to show that the aforementioned parcels and contents were entered into the United States Mail at Arnold, Missouri.

Postal employees S. Connell and R. Keitz, Arnold, Missouri Post Office, can testify that the three aforementioned insured parcels were receipted for by the United States Postal Service.

Special Agents Harold K. McPherson, James Stabile, and Clark Young, Alcohol Tobacco and Firearms, Bureau of the Treasury Department, telephone number 622-5563, can testify to the information contained in this report.

Postal Inspectors J. D. Nichols and G. P. Wellner, 1720 Market Street, Saint Louis, Missouri, telephone number 622-5581, can testify to the information contained in this report.

EXHIBITS

1. Browning Arms Company invoice numbers 73864, 87008, and 105981 contain information regarding the insured numbers and serial numbers of the aforementioned handguns.

2. Sworn statement of Joe L. Boaz, Jr., dated September 24, 1973.
3. Cancelled checks of Joe L. Boaz, Jr., payable to Eugene and Gene Lovosco for payment of the handguns.
4. PS Forms 3877-A, Receipt of Insured Mail, for the three insured parcels completed by Postal employees of the Arnold, Missouri Post Office.
5. Eight Browning handguns bearing serial numbers described under Details of Offense.

Photocopies of Exhibits 1 through 4 are transmitted with this report. The Browning handguns are presently in the possession of ATF Agent Harold L. McPherson but will be made readily available upon request.

If I can be of further assistance in this case, please feel free to contact me at telephone number 622-5581.

Sincerely,

/s/ G. P. Wellner
G. P. WELLNER
Postal Inspector

SUPREME COURT OF THE UNITED STATES

No. 75-1844

UNITED STATES, PETITIONER

v.

EUGENE LOVASCO, SR.

ORDER ALLOWING CERTIORARI
Filed October 12, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 222908 6

No. 75-1844

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE LOVASCO, SR., RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LOUIS GILDEN
722 Chestnut Street
Suite 1501
St. Louis, Missouri 63101
Attorney for Respondent

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OPINION BELOW

The opinion of the Court of Appeals is reported at 532 F.2d 59.

JURISDICTION

The opinion of the Court of Appeals was filed on February 23, 1976. On April 21, 1976, the Court of Appeals denied the Petition for Rehearing and the Petition for Rehearing En Banc. On May 11, 1976, Mr. Justice Blackmun extended the time for filing a Petition for a Writ of Certiorari to and including June 20, 1976.

QUESTIONS PRESENTED FOR REVIEW

I

Were the defendant's Fifth Amendment rights violated by unreasonable pre-indictment delay coupled with prejudice to the defendant?

II

Would the defendant prove that the Government sought the delay to secure an improper tactical advantage by establishing the unreasonable pre-indictment delay and that the Government did not explain or justify its reason for the delay?

III

Must a Motion to Dismiss for a Fifth Amendment violation based on pre-indictment delay await the conclusion of the trial?

STATEMENT OF THE CASE

On March 6, 1975, an indictment was returned by the Grand Jury in four counts in which the first three counts alleged possession of stolen mail matter containing pistols in violation of 18 U.S.C. §1708, and the fourth count alleged sale of firearms without a license in violation of 18 U.S.C. §§922(a)(1) and 924(a).

On March 18, 1975, defendant filed a Motion to Dismiss the indictment in which he alleged pre-indictment prejudice in the delay between the time that he was interviewed by the Government, which was September 26, 1973, and the presentation to the Grand Jury on March 6, 1975, a period of about 17 months. The Motion was heard and submitted on April 25, 1975. On October 8, 1975, an Order was entered by the District Court sustaining the Motion to Dismiss as to all counts.

The testimony before the District Court established that a statement was taken from the defendant on September 26, 1973, and that the Postal Inspector's Office submitted a report to the United States Attorney on October 2, 1973, naming the defendant as the "offender". Page 4 of this report named the witnesses against the defendant, their testimony, and the exhibits to be introduced into evidence against defendant.

The defendant testified that two witnesses for him were now deceased. One was Thomas Lovasco, brother of the defendant, who had

been employed by Florissant Dodge where Joe Boaz, a Government witness (D.Exh.A)(Tr. 16), also worked (Tr. 6). That Thomas Lovasco, who introduced Boaz to defendant, was present during all of the transactions, and died in April, 1974. The other deceased witness was Tom Stewart. Defendant testified that he had obtained some guns from him, and that Stewart had died about six months before the hearing on the Motion (Tr. 8).

Mr. G.P. Wellner, the Postal Inspector, testified that defendant called him at his office some 5 or 6 times (Tr. 15) after defendant had given him the statement in his office in September, 1973 (Tr. 18) and expressed concern about a possible indictment on these occasions (Tr. 6). Mr. Wellner further testified that defendant's Exhibit A was the entire written report submitted to the United States Attorney (Tr. 20). The Government stipulated that the matter was scheduled for the Grand Jury without any additional evidence (Tr. 20).

On August 8, 1975, the Government presented a superseding information charging a misdemeanor (Tr. 24), to which the defendant pled guilty. After inquiry by the Court, the Court refused to accept the plea which was concurred in by the Government (Tr. 32).

On October 8, 1975, the District Court entered an Order sustaining the Motion to Dismiss the four counts of the indictment and found:

> "The evidence disclosed and we find that as of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to defendant's alleged commission of the offenses charged against him, but did not charge defendant or present the matter to a grand jury until more than 17 months thereafter. The indictment was returned March 6, 1975."

and further held that defendant had been prejudiced by the delay by reason of the death of Tom Stewart, a material witness on his behalf, and that the Government's delay had not been explained or justified and that it was unnecessary and unreasonable.

On February 23, 1976, a divided panel of the Appeals Court, consisting of Justice Clark and Judge Bright, sustained the dismissal of the three counts of possession of stolen mail matter, and ordered reinstatement of the count of sale of firearms without a license. The majority held that defendant had established that the pre-indictment delay was unjustified, unnecessary and unreasonable and that the defendant was prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. A dissent was filed by Judge Henley.

REASONS FOR DENYING THE WRIT

I

The defendant's Fifth Amendment rights were violated by unreasonable pre-indictment delay coupled with prejudice to the defendant.

The Court of Appeals has found here that defendant satisfied the two basic elements to a claim of pre-indictment delay to constitute a violation of due process of law under the Fifth Amendment, unreasonable pre-accusation delay coupled with prejudice to the defendant. This criteria was discussed in United States v. Jackson, 504 F.2d 337, 339 (8th Cir. 1974), cert. denied 420 U.S. 964 (1975) and was based on United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) in which this Court recognized that there may be a Fifth Amendment violation of due process for pre-prosecution delay.

a. The Government has not appealed to this Court the finding made by the Appeals Court that actual and substantial prejudice was established, (Brief, p. 18, n. 12); however, it does go on to argue these facts and questioned the impairment to the defense by the delay.

The prejudice here is obvious in that two witnesses died prior to the date of the indictment. Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). These two witnesses were the defendant's brother, Tom Lovasco, who was present during all of the transactions with a co-worker, Joe Boaz, the Government witness to whom the guns were allegedly sold, and Tom Stewart, an individual from whom defendant had obtained some guns. Tom Lovasco died in April, 1974, and Tom Stewart died about six months before the hearing on the Motion, or 5 months prior to indictment.

The Appeals Court found "that were Stewart's testimony available it would support his claim that he did not know that the guns were stolen from the United States mails." Tom Lovasco could have testified about the transactions with Joe Boaz, and that the defendant made no statements indicating knowledge that the guns were stolen.

Thus, it is obvious that defendant has been impaired in his defense by the death of two witnesses during the prolonged delay of the presentation of the matter to the Grand Jury. A trial of the cause without the witnesses negates defendant's rights to a fair trial.

b. The Government has not appealed to this Court the finding by the Appeals Court on the unreasonable pre-indictment delay:

> The district court deemed the delay unjustified, unnecessary and unreasonable. That determination is supported by the evidence.

The District Court in its Order stated:

> The evidence disclosed and we find that as of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to defendant's alleged commission of the offense charged against him, but did not charge defendant or present the matter to a grand jury until more than 17 months thereafter.

Further, the Appeals Court stated in its opinion:

> The postal inspector in charge of the case testified that he would have recommended the prosecution of the case and presentation of the evidence to the grand jury based on the information contained in the report submitted to the United States Attorney on October 2, 1973.

The Government has argued that the delay was caused by the Government's efforts to identify persons, in addition to Respondent, who may have participated in the offenses charged in the indictment (Brief, p. 14). No evidence was presented on these

efforts before the District Court. The Appeals Court even gave the Government the benefit of any doubt by incorporating the statement of the prosecutor at oral argument, which was not before the District Court:

> At oral argument the prosecutor indicated the delay in the prosecution resulted from awaiting results of further investigation which might have implicated the person or persons who may have stolen the mailed matter.

However, the Appeals Court answered this by saying:

> No reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft of firearms from the United States mails.

Thus, the Government in fact did not give any reason or excuse for its failure to present the matter earlier.

The Government rationalizes its delay by stating that prosecutors have limited resources, that there is a problem of assigning priorities, and that these are institutional problems and not malevolent considerations.

This constitutionally impermissable reasoning is answered by United States v. Barket, 530 F.2d 181, 195 (8th Cir. 1976):

> The fact that the governmental lack of communication between its component parts "was inadvertent" does not lessen its impact. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). This conduct adds an additional factor favoring Barket in the Fifth Amendment balance. See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

As a result of the failure of the Government to support any reasons for delay and to refute the prejudice to defendant, the Government has argued that this Court's dictum in United States v. Marion, supra, suggests that due process would require the dismissal of an indictment only if it were shown that pre-indictment delay caused substantial prejudice to the accused's right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

The Eighth Circuit in United States v. Jackson, supra, p. 339, n. 2, believed that the rule in Marion required the defendant to affirmatively demonstrate prejudice where the Government is not engaging in intentional delay in order to gain a tactical advantage over the accused.

It is believed that the facts here support a dismissal of the three counts of the indictment as that "delicate judgment based on the circumstances of each case" United States v. Marion, supra, at p. 325.

II

The defendant proved that the Government sought the delay to secure an improper tactical advantage by establishing the unreasonable pre-indictment delay and that the Government did not explain or justify its reason for the delay.

The Government's position that the defendant must prove that the Government sought the delay to secure an improper tactical advantage is satisfied by the defendant presenting evidence of the unreasonable lengthy delay and the failure of the Government to explain or justify its reason for this delay.

The Government would like this Court to rule that the defendant must prove affirmatively, in addition to prejudice, that the delay was an intentional device to gain tactical advantage over the accused. The reason for this approach is transparent. No one could ever satisfy this criteria, this proof is totally subjective, and a due process claim on pre-indictment delay would be hopeless.

It would be difficult or impossible for the defendant to obtain evidence and the names of the Government people who were sitting back waiting for all of defendant's witnesses to die, or until witnesses disappear, or until all memories of the incidents fade.

Thus, if this Court believes that such an element of proof of "gaining tactical advantage" must be proven, then the District Court and the Appeals Court have in effect ruled for defendant on that point.

Prima facie proof should be established in the sameway as in a race case, McDonnell Douglas v. Green, 411 U.S. 792, 802 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), by showing that there has been:

1. an inordinate amount of lapse of time between the completion of the investigation and the presentation to the Grand Jury;

2. that at the completion of the investigation there was no further investigation necessary to present evidence to the Grand Jury;

3. that the nature of the crime was not one that requires

continuous investigation.[1]

The burden should then shift to the Government to give a reason or justification for its delay.

The defendant can then show the pretextuality if any for the reason given.

Here, the defendant satisfied all criteria above and the Government gave no reasons; therefore, defendant was not called upon to rebut the reasons.

Thus, the District Court and the Appeals Court's findings:

> "that the delay was unjustified, unnecessary and unreasonable"

should establish the proof that the delay was sought to secure an improper tactical advantage.

III

A Motion to Dismiss for a Fifth Amendment violation based on pre-indictment delay should not await the conclusion of the trial.

The Government has stated that the due process claim here should be resolved after trial.

The matter of delay in the presentation to the Grand Jury is not a relevant detail in most trials. The facts of the delay are capable of determination without the trial of the general issue. Rule 12(b), Federal Rules of Criminal Procedure, and there is no good

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[1] This case does not involve the matter of narcotics and the special reasons for delay of an indictment. See United States v. Jackson, supra, at p. 340; United States v. Washington, 504 F.2d 346 (8th Cir. 1974); United States v. Norton, 504 F.2d 342 (8th Cir. 1974); United States v. White, 488 F.2d 660 (8th Cir. 1973); United States v. Emory, 468 F.2d 1017 (8th Cir. 1972). Nor is this a complicated case of conspiracy or fraud. See United States v. Marion, supra; United States v. Librach, 520 F.2d 550 (8th Cir. 1975).

reason for the Motion to be deferred for determination after verdict under Rule 12(e), Federal Rules of Criminal Procedure.[2]

A dismissal of the indictment, if the facts warrant, prior to trial will certainly be an economy of judicial time. There is no reason to believe as suggested by the Government, that the pre-trial hearing would be lengthy, and there doesn't appear to be any reason why there would be duplication of evidence.

Constitutional challenges on the Fourth Amendment prior to trial on illegal searches and seizures are held routinely in Federal Courts in which facts which are also testified to at trial are presented without apparently burdening the Court's calendar.

The Government here is attempting to avoid its responsibility to answer at an early time the claim of prejudicial delay. Fairness would dictate that a defendant should not have to wait for the resolution of a constitutional challenge to the indictment. If the facts warrant a dismissal, the time and money for a trial are avoided.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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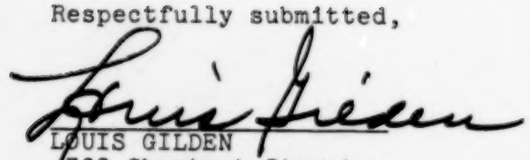
[2] See United States v. Covington, 395 U.S. 57, 60, 89 S.Ct. 1559, 23 L.Ed.2d 94 (1969).

Respectfully submitted,



LOUIS GILDEN
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St. Louis, Missouri 63101
Attorney for Respondent

No. 75-1844

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE LOVASCO, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
JOHN P. RUPP,
Assistant to the Solicitor General,
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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1844

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE LOVASCO, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F.2d 59.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 23, 1976. On April 21, 1976, the court of appeals denied a petition for rehearing with suggestion for rehearing *en banc* (Pet. App. C). On May 11, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 20, 1976 (a Sunday). The petition was filed on June 21, 1976, and was granted on

October 12, 1976 (A. 27). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who seeks the dismissal of an indictment because of pre-accusation delay must show that the government intentionally sought the delay in order to secure an improper tactical advantage as well as that the delay impaired his ability to defend against the charges.

2. Whether a district court should reserve ruling on a due process claim based upon pre-accusation delay, and alleging both governmental misconduct and consequent prejudice, until after trial, at which time such allegations can be assessed in light of the evidence introduced at trial.

STATEMENT

1. Respondent was indicted on March 6, 1975, in the United States District Court for the Eastern District of Missouri on three counts of unlawful possession of materials stolen from the mails, in violation of 18 U.S.C. 1708, and on one count of engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 924(a). The indictment referred specifically to eight handguns that respondent allegedly had possessed and sold between July 25 and August 31, 1973 (A. 3–5).[1]

[1] Count One charged respondent with unlawfully possessing a semi-automatic pistol on or about July 25, 1973; Count Two charged that he unlawfully possessed another such pistol on or about July 27, 1973; Count Three charged that he unlawfully possessed six additional semi-automatic pistols on or about August 31, 1973; and Count Four charged respondent with having sold firearms without the necessary license (A. 3–5).

On March 18, 1975, respondent, invoking Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment, moved to dismiss the indictment (A. 6–7). He alleged in his motion (1) that the government had not obtained any information relating to the offenses charged in the indictment after September 26, 1973; (2) that the government thereafter had delayed presenting the evidence against him to the grand jury for a period of approximately 18 months; (3) that the delay in presenting such evidence was unreasonable; and (4) that the delay had caused him to experience "anxiety and concern" (A. 6). Respondent did not allege that the government had delayed seeking an indictment to secure an improper tactical advantage over him, and he made no effort to particularize the respects in which the delay had impaired his ability to defend against the charges.[2]

On April 25, 1975, the district court held a hearing on respondent's motion to dismiss (A. 8–20). The government stipulated at the outset of the hearing that a postal inspector had interviewed respondent in September 1973 concerning a series of thefts from a mail facility operated by the Terminal Railroad Association in St. Louis, Missouri, and that, although investigation of the thefts had continued thereafter,

[2] In fact, respondent did not assert explicitly that the delay had impaired his ability to defend himself at trial. In addition to claiming that he had experienced "anxiety and concern," he alleged only that he had "been prejudiced by the delay in the presentment to the Grand Jury" (A. 6).

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only one witness had been discovered after September 1973 who might have bolstered the government's case against respondent (A. 9–10).

In support of his allegation that the government had sufficient evidence as of September 1973 to warrant presenting the case against him to the grand jury, respondent introduced at the hearing a report that had been prepared by Postal Inspector G. P. Wellner (A. 8–9, 21–26). The report was dated October 2, 1973, and had been forwarded to the United States Attorney at that time (A. 18–19). The report indicated that between August 20 and September 5, 1973, government agents had purchased three semi-automatic handguns from Martin Koehnken and a fourth handgun from David Northdurft. These handguns had been sold by the Browning Arms Company to various retailers but had been stolen, prior to their receipt by the retailers, after mailing from a Terminal Railroad Association facility in St. Louis. Government agents arrested Koehnken on September 11, at which time they seized four additional stolen handguns.[3] Subsequent investigation revealed that Koehnken had purchased the eight guns—including the gun that Northdurft had sold to the agents—from Joe Boaz. Boaz was interviewed on September 24, 1973, and admitted that he had known that the guns were "hot" when he sold them to Koehnken. Boaz also stated during the interview that he had ob-

[3] Koehnken subsequently pleaded guilty to a single count charging him with having engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) (see A. 23).

tained all eight guns from respondent between July 26 and September 11, 1973 (A. 22–24).

Respondent, a switchman for the Terminal Railroad Association, was interviewed in the presence of his attorney on September 26, 1973. He claimed that after having visited his son, a mail handler for the Railroad Association, he had found "four or five" handguns in a sack in the back seat of his automobile.[4] He admitted selling the guns he had found to Boaz, but he specifically denied having sold Boaz all eight of the guns that had been purchased or seized from Koehnken. The report also indicated that respondent would not have had access to insured mail parcels in the normal course of his duties as a switchman and that, although his son would have had access to insured parcels and had endorsed and cashed three of the four checks that Boaz had given respondent as payment for the guns, the postal inspectors had no direct evidence at that time that respondent's son was responsible for the thefts (A. 24).

Respondent testified at the hearing that two "possible" witnesses on his behalf had died during the eighteen-month delay referred to in his motion to dismiss—his brother and Tom Stewart.[5] He testified that his brother, who had worked prior to his death

[4] Respondent claimed that he had visited his son while his son was at work and that he had left his automobile unlocked during the visit (A. 24).

[5] Respondent testified that Stewart had died approximately six months before the date of the hearing and that his brother had died in April 1974, approximately one year before the hearing (A. 11–12).

at the same place of business as Boaz, had introduced him to Boaz and had been present when he made arrangements by telephone to obtain guns to sell to Boaz (A. 11–12). Respondent also testified that he had obtained "some of the guns" identified in the indictment from Stewart and that he had arranged to obtain those guns by telephoning Stewart from Boaz's office (A. 12).[6] On cross-examination, however, respondent stated that he had obtained only "two or three" guns from Stewart in that manner (A. 13). He conceded further that he had told the postal inspector who had questioned him that he had found some of the guns he had sold in a sack in the back seat of his automobile and that he had not mentioned Stewart's name at that time. He explained that he had not disclosed Stewart's involvement earlier because Stewart "was a bad tomato" and "was liable to take a shot" at him (*ibid.*). Respondent did not specify at the hearing what exculpatory evidence his brother or Stewart might have provided.[7]

2. On October 8, 1975—following an aborted attempt by respondent to plead guilty to a misde-

[6] Like respondent, Stewart worked as a switchman at the Railroad Terminal Association (A. 11) and, as a consequence, presumably would not have had access to insured mail parcels in the normal course of his duties.

[7] Postal Inspector Wellner was also a witness at the hearing and testified that evidence had been presented to the grand jury tending to show that persons in addition to respondent had been involved in the matters charged in the indictment (A. 20). The government earlier had informed the court that its theory of the case was that respondent had received the handguns referred to in the indictment from his son (A. 13–14).

meanor[8]—the district court entered an order dismissing all counts of the indictment. The court based its dismissal on Rule 48(b) of the Federal Rules of Criminal Procedure, stating in relevant part (Pet. App. 14a):

> [A]s of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to [respondent's] alleged commission of the offenses charged against him, but did not charge [respondent] or present the matter to a grand jury until more than 17 months thereafter. * * *
>
> As a result of the delay [respondent] has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. The Government's delay has not been explained or justified and we find it unnecessary and unreasonable.

On February 23, 1976, a divided panel of the court of appeals affirmed the dismissal of the three possession counts of the indictment and ordered reinstatement of the court charging respondent with dealing in firearms without a license. The majority (comprised of Justice Clark and Judge Bright) rested its

[8] On August 8, 1975, respondent attempted to plead guilty to a superseding information charging him with having knowingly and willfully obstructed and retarded the passage of mail matter, in violation of 18 U.S.C. 1701. But during the hearing on the plea, respondent repeated his earlier statement about having found the handgun referred to in the information in an unmarked package in the back seat of his automobile. The government informed the court that "it's our position that if [respondent] didn't know it was mail matter then he cannot enter a plea of guilty to the offense" (Plea Tr. 32), and the court thereafter declined to accept the plea.

affirmance upon its finding that respondent had established "the two basic elements essential to a claim of preindictment delay—unreasonable delay and prejudice to [his] ability to defend against the charges" (Pet. App. 5a). Although the majority acknowledged that the delay had been occasioned by the government's desire to identify additional persons who may have participated in the thefts, it nevertheless concluded that the district court's finding that the delay was "unjustified, unnecessary, and unreasonable" was supported by the evidence (*ibid.*). With respect to the district court's finding of prejudice, the majority relied upon the assertion of respondent's counsel in brief and argument—but not made at or supported by the testimony at the hearing on the motion to dismiss—"that were Stewart's testimony available it would support his claim that he did not know that the guns were stolen from the United States mails" (*ibid.*).[9]

Judge Henley dissented from the decision insofar as it upheld the district court's dismissal of the three possession counts, in part for the reasons stated in his dissenting opinion in *United States* v. *Barket,* 530 F. 2d 189, 197–199 (C.A. 8). Judge Henley stressed that "the fifth amendment protection against pre-indictment or preprosecution delays is not coextensive

[9] The court reversed the district court's dismissal of the count of the indictment charging respondent with dealing in firearms without a license, after having concluded that that count related solely to a transaction between respondent and Boaz and that Stewart's death could not have impaired respondent's ability to defend against that charge (Pet. App. 6a–7a).

with the 'speedy trial' protection accorded by the sixth amendment" and that "the subject of a criminal investigation has no constitutional right to immediate prosecution or arrest" (Pet. App. 8a). Judge Henley also pointed out that respondent had not offered any evidence tending to show that the delay in obtaining the indictment "was motivated by any sinister desire on the part of the investigating officers or the United States Attorney to gain a tactical advantage * * *" (*id.* at 8a–9a).[10]

Judge Henley noted additionally that respondent's belated assertion of prejudice as a result of Stewart's death made that assertion highly suspect (*id.* at 9a–10a), and he concluded that, in any event, "the district court's finding that [respondent] sustained substantial prejudice as a result of the death of Tom Stewart was purely speculative and for that reason was clearly erroneous" (*id.* at 9a). According to Judge Henley (*id.* at 11a):

> When a district judge sustains in advance of trial a motion to dismiss an indictment because of prejudicial pre-indictment delay, he takes a stringent measure. And if such a motion is improvidently granted, it adversely affects the public interest in the enforcement of the criminal law, and it also encourages the filing

[10] In *Barket, supra,* Judge Henley had stated (530 F. 2d at 198):

> [P]rejudice conceded, my position in a case of this kind is that pre-prosecution delay does not amount to a denial of due process absent a showing of bad faith or improper motive on the part of the government in delaying the prosecution, or a showing of detrimental reliance by a putative defendant on the initial decision of the government not to prosecute.

> of meritless motions, similarly based, by other defendants. The dismissing of indictments on account of the government's delay in obtaining them is not an acceptable solution to the problem of crowded criminal calendars, and in my opinion motions such as * * * [respondent's] should not be granted in advance of trial except in clear cases.

SUMMARY OF ARGUMENT

I.

The standard employed by the Eighth Circuit in this and other recent cases for assessing the permissibility of pre-accusation delay renders this Court's decision in *United States* v. *Marion,* 404 U.S. 307, largely meaningless. In effect, the Eighth Circuit has imported into the pre-accusation phase of criminal proceedings obligations of efficient investigation and prompt indictment measured by standards comparably stringent to those adopted by this Court to govern application of the Sixth Amendment's explicit speedy trial requirement. In the process, the court has obliterated most if not all of the distinction between pre-accusation and post-accusation prosecutorial obligations, ignored substantial public policies that strongly counsel against rules that encourage premature public accusation, and created a host of practical difficulties having serious import for the administration of criminal justice. There was good reason for this Court's view in *Marion* that pre-accusation delay is materially different in nature and impact and should accordingly be assessed under less exacting criteria. We suggest again, as we did in *Marion,*

that the severe sanction of dismissal of charges is appropriate only in the rare case in which the defendant can demonstrate both that the delay stemmed from invidious motivations and that it caused substantial prejudice to his defense.

1. The decision in this case ignores significant differences in the status of persons before and after formal accusation—differences at the heart of this Court's determination in *Marion* that the obligations imposed by the Sixth Amendment's speedy trial provision are triggered by formal accusation, rather than by some prior act or omission attributable to the government. The personal disabilities that generally attend formal accusation either do not exist or are much less severe prior to arrest and holding to answer or the bringing of criminal charges. At the same time, delaying arrest or charge pending further investigation often benefits both the person suspected of criminal conduct and society generally by avoiding unwarranted or ill-considered accusations and by shortening the time between the bringing of charges and the defendant's opportunity to secure a determination of the charges at trial.

2. These considerations strongly counsel against a construction of the Due Process Clause obligating the government to institute formal criminal proceedings as soon as it might be thought to have probable cause to do so. There is, in fact, little justification for permitting courts to attempt to balance the various interests implicated during the pre-accusatory phase of criminal proceedings, since statutes of limitation already perform that function. Absent extraordinary

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circumstances, not present in this case, "[s]uch legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay." *Dickey* v. *Florida*, 398 U.S. 30, 47 (Brennan, J., concurring).

3. Assessing the permissibility of pre-accusation delay on a basically ad hoc basis would also entail unacceptable costs to the criminal justice system, without providing assurance of fairer results than those produced by application of the relevant statute of limitations. Perhaps most importantly, an ad hoc approach would require courts to engage in lengthy hearings and to resolve a variety of essentially policy disputes that transcend the individual case.

II.

The decision in this case also departs from previously accepted standards by endorsing a procedure for resolving due process claims based upon pre-accusation delay that, in practical effect, significantly dilutes the requirement that the defendant demonstrate that the delay caused actual and substantial prejudice to his ability to defend against the charges. While it may sometimes be possible, and not unduly burdensome, for a court to determine with some assurance prior to trial whether the government sought to delay formal accusation to secure an improper tactical advantage, the same will seldom be true of allegations of defense prejudice. The enhanced ability to make a sound assessment of claims of prejudice after trial, combined with the substantial economy of judicial and prosecutorial resources that will be accomplished by avoiding a lengthy pretrial hearing that will be largely duplicative of the trial itself, prove the soundness of the rule, which we urge this Court to adopt, requiring that due process claims such as respondent's normally be resolved after trial.

ARGUMENT

I.

A DEFENDANT SEEKING THE DISMISSAL OF CRIMINAL CHARGES UNDER THE DUE PROCESS CLAUSE BECAUSE OF PRE-ACCUSATION DELAY MUST SHOW BOTH THAT THE DELAY IMPAIRED HIS ABILITY TO DEFEND AGAINST THE CHARGES AND THAT THE GOVERNMENT SOUGHT THE DELAY TO SECURE AN IMPROPER TACTICAL ADVANTAGE

A. IN THE ABSENCE OF PROSECUTORIAL CONDUCT DESIGNED TO OBTAIN AN IMPROPER TACTICAL ADVANTAGE, THE PERMISSIBILITY OF PRE-ACCUSATION DELAY IS GOVERNED SOLELY BY THE APPLICABLE STATUTE OF LIMITATIONS

In *United States* v. *Marion*, 404 U.S. 307, this Court held that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge * * * engage the particular protections of the speedy trial provisions of the Sixth Amendment" (404 U.S. at 320). At the same time, *Marion* acknowledged that pre-accusation delay might in some instances violate the Due Process Clause of the Fifth Amendment and require the dismissal of criminal charges. Specifically, this Court referred approvingly to the government's suggestion that the Due Process Clause would require the dismissal of an indictment "if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to * * * [the accused's] right[ ]

to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324; footnote omitted).

Several courts of appeals have had occasion in the wake of *Marion* to consider the application of the Due Process Clause to particular instances of pre-accusation delay. The position of the Eighth Circuit is exemplified by the decision in this case. The panel majority held here that the showing required of a defendant claiming a violation of due process because of pre-accusation delay is limited to "two basic elements"—a demonstration that the delay was "unreasonable" and a showing that it prejudiced the defendant's ability to defend against the charges (Pet. App. 5a). The majority then went on to hold that the delay that occurred here was unreasonable because the "essential" facts underlying the indictment were known to the prosecutor approximately 17 months prior to respondent's indictment, and "[n]o reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft of firearms from the United States mails" (*ibid.*). In an earlier case, *United States* v. *Barket,* 530 F.2d 181, a divided panel of the Eighth Circuit had explained that pre-accusation delay is "unreasonable" whenever the defendant has been able to show that the delay was caused by "governmental negligence" (*id.* at 195).[11]

[11] Accord, *United States* v. *Jackson*, 504 F. 2d 337, 339–341 (C.A. 8), certiorari denied, 420 U.S. 964. In other recent cases, the Eighth Circuit has explained that pre-accusation delay is "unreasonable" if it is not affirmatively justified by the government and that "as the delay increases, the specificity with which prejudice must appear, diminishes" (*United States* v. *Naftalin*, 534 F. 2d 770, 773,

The negligence standard adopted by the Eighth Circuit in this and other recent cases renders this

certiorari denied, No. 75–1720, October 4, 1976). *United States* v. *Page*, No. 76–1[illegible]2, decided November 23, 1976 (slip op. 3); *United States* v. *Quinn*, 540 F. 2d 357, 360–362; *United States* v. *Librach*, 520 F. 2d 550, 554–555; *United States* v. *Norton*, 504 F. 2d 342, 344–345, certiorari denied, 419 U.S. 1113; see also *United States* v. *Washington*, 504 F. 2d 346, 347–348.

Three other circuits appear to agree with the Eighth Circuit that a defendant claiming a violation of due process because of pre-accusation delay need not show that the government delayed accusation for improper tactical reasons. *United States* v. *Sand*, 541 F. 2d 1370, 1373–1374 (C.A. 9); *United States* v. *Erickson*, 472 F. 2d 505, 507 (C.A. 9); *United States* v. *Wilson*, 357 F. Supp. 619 (E.D. Pa.), affirmed, 517 F. 2d 1400 (CA. 3); *United States* v. *Dukow*, 453 F. 2d 1328, 1330 (C.A. 3), certiorari denied *sub nom. Crow* v. *United States*, 406 U.S. 945; *United States* v. *Alred*, 513 F. 2d 330, 332 (C.A. 6); *United States* v. *Giacalone*, 477 F. 2d 1273, 1276–1277 (C.A. 6). On the other hand, at least four circuits have stated that they require such a showing, although they have not yet been presented with a case in which the defendant has established that the delay prejudiced his ability to defend. *United States* v. *Scallion*, 533 F. 2d 903, 911–912 (C.A. 5); *United States* v. *Duke*, 527 F. 2d 386, 390 (C.A. 5), certiorari denied, June 21, 1976, No. 75–6564; *United States* v. *Joyce*, 499 F. 2d 9, 19–20 (C.A. 7); *United States* v. *Ricketson*, 498 F. 2d 367, 370–371 (C.A. 7); *United States* v. *Beitscher*, 467 F. 2d 269, 272 (C.A. 10); *United States* v. *Daley*, 454 F. 2d 505, 508 (C.A. 1).

The Second Circuit has expressly reserved ruling on the issue presented here. *E.g.*, *United States* v. *Vispi*, No. 76–1250, decided November 15, 1976 (slip op. 516–517 and n. 4); *United States* v. *Finkelstein*, 526 F. 2d 517, 521. Using its supervisory powers "but mindful of the due process overtones of the problem" (*United States* v. *Jones*, 524 F. 2d 834, 840), the Court of Appeals for the District of Columbia Circuit has adopted an approach to pre-accusation delay in narcotics cases similar to that employed by the Eighth Circuit in this case. *E.g.*, *Robinson* v. *United States*, 459 F. 2d 847; *Woody* v. *United States*, 370 F. 2d 214; *Daniels* v. *United States*, 357 F. 2d 587; *Bey* v. *United States*, 350 F. 2d 467; *Ross* v. *United States*, 349 F. 2d 210. Defendants in other types of cases in the District of Columbia Circuit appar[illegible]ust demonstrate both prejudice and improper motivation by the government. *United States* v. *Bridgeman*, 523 F. 2d 1099, 1111–1112.

Court's decision in *Marion* largely meaningless. The Eighth Circuit has held in effect that the Due Process Clause guarantees speedy accusations in much the same way that the Sixth Amendment guarantees speedy trials. Consistently with this view of the Due Process Clause, the standard employed by the court for assessing the permissibility of pre-accusation delay is the functional equivalent of the standard adopted by this Court in *Barker* v. *Wingo,* 407 U.S. 514, for assessing the permissibility of post-accusation delay. In fact, in one recent case, *United States* v. *Barket, supra,* the Eighth Circuit relied explicitly upon *Barker* for the proposition that negligence or inadvertence by the government, delaying the obtaining of an indictment and prejudicing the defense, violates the Due Process Clause (530 F. 2d at 193).

But as *Marion* makes clear, the situation of a potential defendant does not compare with the situation of a defendant who has been arrested and held to answer or otherwise formally accused of criminal conduct. The Eighth Circuit's approach to pre-accusation delay also ignores substantial public policies—of benefit both to potential defendants and to society as a whole—that that would be disserved by rules that encourage premature public accusation of persons suspected of having engaged in criminal conduct. The standard employed by the Eighth Circuit also involves perhaps insuperable practical difficulties, without providing assurance of more equitable results than those produced by application of the relevant statute of limitations.

1. The approach to pre-accusation delay exemplified by the decision in this case ignores significant differences in the status of persons before and after formal accusation

This Court's determination in *Marion* that the obligations imposed by the Sixth Amendment's speedy trial provision are triggered by formal accusation, rather than by some prior act or omission attributable to the government, was deeply rooted in the policies subsumed by that guarantee—policies that cannot casually be transferred to the due process inquiry in cases of pre-accusation delay. Despite the presumption of innocence to which persons charged with criminal offenses are entitled, the making of a formal accusation—whether signified by arrest and holding to answer or by the issuance of criminal charges—almost inevitably alters the status of the subject to his detriment. Arrest is a public act that carries the implication that the government has probable cause to believe that the person arrested has committed a crime. The arrest and lodging of a criminal charge "may seriously interfere with the defendant's liberty, whether he is free on bail or not, and * * * may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends" (*United States* v. *Marion, supra,* 404 U.S. at 320).[12]

[12] Accord, *Dillingham* v. *United States*, 423 U.S. 64. When we speak of an arrest triggering the protections of the Sixth Amendment, we are referring of course to one followed by a formal complaint and the holding of the arrested individual to answer criminal charges, as by being bound over to await the action of a grand jury following a preliminary hearing. When an individual is ar-

The issuance of an indictment or information has precisely the same effects. Moreover, "[i]nordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense"—although "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense" (*ibid.*).[13]

Thus, once a person has been formally accused of a crime, the Constitution explicitly enjoins the prosecution and the judiciary to proceed with "orderly expedition" (*Smith* v. *United States,* 360 U.S. 1, 10). Determining whether a particular criminal prosecution has proceeded with orderly expedition or at an appropriately "deliberate pace" (*United States* v. *Ewell,* 383 U.S. 116, 120) requires courts to engage in a sensitive balancing process—taking into consideration the length of the delay between formal accusation and trial, the reasons for the delay, the defendant's assertion of his right, and prejudice consequent upon the delay. *Barker* v. *Wingo, supra,* 407 U.S. at 530–533. This balancing process must be carried out "with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution" (*id.* at 533) and is of a "fundamental" nature (*Klopfer* v. *North Carolina,* 386 U.S. 213, 223).[14]

Prior to formal accusation, the interests of a potential defendant and of a society concerned with the even-handed enforcement of the criminal laws are quite different. As this Court pointed out in *Marion,* prior to arrest or charge "a citizen suffers no restraints on his liberty and is not the subject of public accusation * * *" (404 U.S. at 321). The impact on job, family, and personal finances is generally nonexistent or far less severe prior to formal accusation than after. Although the fact that criminal investigation is in progress may become known on occasion to persons not involved in the investigation, any rumors that may surface concerning the identity of potential defendants seldom will be as damaging to those persons as the act of formal accusation—which, because of its official nature and the status of those responsible for it, will serve almost inevitably to transform any preexisting rumor into apparently justified suspicion. Similarly, while we recognize that anxiety may

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rested but then released without being held to answer criminal charges, the protections of the Speedy Trial Clause would not attach until formal charges are brought. *E.g., United States* v. *Bishton,* 463 F. 2d 887, 891 (C.A. D.C.); but see *United States* v. *MacDonald,* 531 F. 2d 196, 204–205 (C.A. 4), petition for a writ of certiorari pending, No. 75–1892.

[13] Indeed, as this Court pointed out in *Barker* v. *Wingo,* 407 U.S. 514, 521, delay in the prosecution of criminal charges actually may operate to the defendant's advantage at trial. Since the prosecution carries the burden of proof, the prosecution is often more vulnerable than the defense to any delay that results in the loss of relevant evidence. See *Dickey* v. *Florida, supra,* 398 U.S. at 46 n. 10 (Brennan, J., concurring). Delay may also enable defendants "to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system" (*Barker* v. *Wingo, supra,* 407 U.S. at 519).

[14] Accord, *Dickey* v. *Florida, supra,* 398 U.S. at 37; *Smith* v. *Hooey,* 393 U.S. 374, 375.

The period following formal accusation is now also governed by the Speedy Trial Act of 1974, 88 Stat. 2076, 18 U.S.C. (Supp. IV) 3161 *et seq.*, and local rules adopted pursuant to that statute. See also Rule 50(a), (b), Fed. R. Crim. P.

be suffered by persons with knowledge of an ongoing criminal investigation touching upon their activities, that anxiety, in the usual case, is increased measurably by formal accusation—with its heightened prospect of a criminal trial and eventual punishment. In sum, in most relevant respects the situation of a potential defendant "does not compare with that of a defendant who has been arrested and held to answer" (*United States* v. *Marion, supra,* 404 U.S. at 321) or charged formally with criminal activity. Cf. *Kirby* v. *Illinois,* 406 U.S. 682, 689–691.

There is another, and quite significant, respect in which the impact of pre-accusation delay on a potential defendant is different from the effect of post-accusation delay on an actual defendant. During a period of pre-accusation delay, whether such delay is a product of further investigation of the case or simple inertia, additional facts may come to light showing that the person originally under suspicion was not actually involved in the matter being investigated, that no criminal conduct occurred, or that the case is an appropriate one for a discretionary decision not to prosecute.[15] Thus, delaying arrest or charge may serve to avoid placing a suspect in the position of having been accused publicly of criminal activity. Even if

[15] As this Court pointed out in *Kirby* v. *Illinois, supra,* 406 U.S. at 689:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point for our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute,

ultimately indicted, moreover, the delay may shorten the period between the bringing of charges and the defendant's opportunity to secure an acquittal on those charges at trial.

Given these substantial differences in the status of persons before and after formal accusation, this Court's refusal in *Marion* to extend the protections of the speedy trial provision of the Sixth Amendment to the period preceding formal accusation is readily understandable.[16] Those considerations support the basic thrust of this Court's decision in *Marion* that

> and only then that the adverse positions of government and defendant have solidified. * * *

See also *United States* v. *Finkelstein, supra,* 526 F.2d at 526 ("The deliberate pace of the investigation redounded to society's benefit in two ways: it protected an innocent party and ferreted out two who were culpable."); *United States* v. *Capaldo,* 402 F.2d 821, 823 (C.A. 2), certiorari denied, 384 U.S. 989 ("It is usually in the public interest, and frequently to the advantage of the prospective defendant, that charges not be brought until the prosecutor has completed his investigation and feels that there is sufficient likelihood of gaining a conviction."); *United States* v. *Feinberg,* 383 F.2d 60, 64–65 (C.A. 2) ("Time-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons."); *United States* v. *Hauff,* 395 F.2d 555, 557 (C.A. 7).

[16] Since respondent did not become an "accused" until he was indicted on March 6, 1975, his reliance upon Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment was misplaced. Respondent moved to dismiss the charges against him on March 18, 1975 (A. 6–7), within two weeks of his indictment. The delay of which he complained preceded his formal accusation and consequently was not governed by Rule 48 of the Sixth Amendment. See *Dillingham* v. *United States, supra,* 423 U.S. 64; *United States* v. *Marion, supra,* 404 U.S. at 313, 319.

the government will not ordinarily be called upon to justify pre-accusation delay. We believe that any exception to this principle should be narrowly circumscribed, extending only, as the *Marion* opinion suggests, to the rare case in which the defendant can demonstrate that the delay stemmed from invidious motivations and caused substantial prejudice to his defense.

2. The Due Process Clause does not require courts to consider on an ad hoc basis the timeliness of criminal charges that are brought within the applicable statute of limitations and are not the product of prosecutorial overreaching

This Court has interpreted the Due Process Clause as "a summarized constitutional guarantee of respect for those personal immunities which * * * are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' * * * or are 'implicit in the concept of ordered liberty' " (*Rochin* v. *California,* 342 U.S. 165, 169; citing *Snyder* v. *Massachusetts,* 291 U.S. 97, and *Palko* v. *Connecticut,* 302 U.S. 319). The right to a fair trial is indisputably fundamental in nature; it is, in fact, the goal of many specific constitutional guarantees. And whether the offending party has been a state or the federal government, the Due Process Clause has served to ensure that criminal trials are conducted within the bounds dictated by "fundamental fairness" (*Duncan* v. *Louisiana,* 391 U.S. 145, 171, 186–187 (Harlan, J., dissenting)) and the "community's sense of fair play and decency" (*Rochin* v. *California, supra,* 342 U.S. at 173). See, e.g., *United States* v. *Agurs,* No. 75–491,

decided June 24, 1976; *Brady* v. *Maryland,* 373 U.S. 83.[17]

Although a defendant's due process right to a fair trial may be violated in certain circumstances despite the absence of affirmative governmental overreaching or bad faith (see *United States* v. *Agurs, supra,* slip op. 12–13; *Brady* v. *Maryland, supra,* 373 U.S. at 87), we know of no case not involving a breach of some duty owed by the government to the defendant in which this Court has found a violation of the Due Process Clause. The requirement of due process does not provide courts with a roving commission to oversee performance by the Executive Branch of its law enforcement responsibilities, exercising a "chancellor's foot" veto over acts or omissions that they consider unjustified or undesirable. Cf. *United States* v. *Russell,* 411 U.S. 423, 435. Particularly in applying the severe remedy of barring the prosecution of persons who are charged with crime, a disciplined and circumscribed exercise of judicial power is called for—one that looks to "all the circumstances" (*Hampton* v. *United States,* 425 U.S. 484, 494 n. 6 (Powell, J., concurring). In the instant context, the circumstances that must be taken into account include those affecting persons having to defend against criminal charges, to be sure, but also those affecting the related, but somewhat broader,

[17] See also *In re Winship,* 397 U.S. 358, 359, and *In re Gault,* 387 U.S. 1, 30, interpreting the Fourteenth Amendment as requiring the adjudicatory phase of state juvenile proceedings to be conducted in accordance with "the essentials of due process and fair treatment."

societal interest in public justice. Cf. *United States* v. *Mandujano,* 425 U.S. 564, 590 (Brennan, J., concurring).

A number of public policies strongly counsel against a construction of the Due Process Clause obligating the government to institute formal criminal proceedings as soon as it might be thought to have probable cause to do so. As already noted, such a requirement—which underlies the court of appeals' decision in the present case—ignores the possibility that decisions to delay formal accusation pending further investigation may benefit potential defendants as well as society generally, particularly if such investigation reveals that the person originally under suspicion was not involved in the matter being investigated or that no criminal conduct occurred. Further investigation may also result in the discovery of related or similar criminal conduct by persons in addition to those originally under suspicion. By ignoring these considerations, the standard for assessing pre-accusation delay employed by the court of appeals encourages haste on the part of law enforcement personnel—at the expense of deliberateness designed to avoid unjustified accusations, of efforts to effectuate the speedy trial mandate of the Sixth Amendment by shortening the period between formal accusation and trial, and of the obvious societal interest in requiring persons guilty of criminal offenses to answer for their conduct.[18] Indeed, so long as formal accusation is de-

[18] See, *e.g.*, *United States* v. *Feinberg*, *supra*, 383 F. 2d at 67 (original emphasis) ("[F]ear of forfeiting a prosecution would frequently induce *unreasonable* speed which 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.' ").

layed to permit further investigation, we believe that such delay can never be considered unjustified. See *United States* v. *Watson,* 423 U.S. 411, 431 (Powell, J., concurring).

At the same time, the court of appeals' definition of "delay" puts prosecutors at risk of violating the Fourth Amendment if they act too soon in arresting persons suspected of criminal conduct and of violating the Fifth Amendment if they wait too long and evidence is lost fortuitously. This Court recognized a similar dilemma in *Hoffa* v. *United States,* 385 U.S. 293. The petitioner in *Hoffa,* relying upon *Escobedo* v. *Illinois,* 378 U.S. 478, argued that since he would have had a right to counsel under the Sixth Amendment had the government taken him into custody and charged him with an offense, he should have been entitled to the same right at the moment the government had sufficient evidence to do so. In rejecting that argument, this Court stated (385 U.S. at 309–310):

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish

> probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction [Footnote omitted].[19]

It is exceedingly difficult to square this Court's assessment in *Hoffa* of the government's responsibility formally to accuse persons suspected of criminal conduct with the view of that responsibility taken by the court of appeals in the present case.

The court of appeals' construction of the Due Process Clause also would interfere in an unwarranted manner with the functioning of the grand jury. The "historic office" of the grand jury in our system of criminal justice "has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens * * *" (*United States* v. *Mandujano, supra,* 425 U.S. at 571). It is essential to the successful performance of this function that the grand jury be afforded both the means of pursuing evidence of criminal conduct and sufficient time in which to do so carefully and dispassionately; to those ends, the law has "vest[ed] the grand jury with substantial powers, because '[t]he grand jury's investigative powers must be broad if its public responsibiilty is adequately to be discharged' " (*id.* at 7; citing *United States* v. *Calandra,* 414 U.S. 338, and *Branzburg* v. *Hayes,* 408 U.S. 665).

Once the grand jury has returned an indictment against an individual believed to have engaged in

[19] This Court referred approvingly in *Marion* to the passage from the opinion in *Hoffa* quoted above (404 U.S. at 325 n. 18).

criminal conduct, there may be substantial restrictions upon its power to inquire further into that matter. See *United States* v. *Doe,* 455 F. 2d 1270, 1273 (C.A. 1). These limitations proceed from the fact that the return of an indictment fundamentally alters the status of the person accused and, consistently with that altered status, changes the predominant character of the proceedings from investigation to adjudication. If the grand jury is required to act upon incomplete information, following an investigation by the police or prosecutor terminated prematurely at the point of mere probable cause, the problems that concerned this Court in *Hoffa* will be compounded appreciably. Decisions by the grand jury based upon less than complete investigation can only increase the incidence of unwarranted accusation, at the expense of persons wrongfully accused, and at the same time permit some of those guilty of criminal offenses to escape sanction for their wrongdoing, at the expense of public justice. And even if the grand jury is able to identify and accuse those guilty of criminal conduct, the act of formal accusation both restricts access by law enforcement personnel to additional evidence that may be needed to prove guilt beyond a reasonable doubt—particularly if that evidence is possessed or controlled by the defendant—and limits the time during which such further investigation may take place. Cf. *Massiah* v. *United States,* 377 U.S. 201.

We do not mean to suggest that the public policies making delay in formal accusation, despite the existence of probable cause, a tolerable and often desirable ingredient of the criminal process eliminates all con-

cern with expeditious enforcement of the criminal laws.[20] But at least when pre-accusation delay is not the result of overreaching by the government to gain an improper tactical advantage, the Due Process Clause does not require courts to consider on an *ad hoc* basis the timeliness of criminal charges brought within the applicable statute of limitations.[21]

[20] The mere fact that a person may have been in a better position to present an effective defense at the time the particular conduct occurred than he was at some later time is hardly sufficient, of itself, to support the conclusion that trial at such later time is offensive to the Due Process Clause. As this Court observed in *United States* v. *Marion*, *supra*, 404 U.S. at 324–325 (footnote omitted), "no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution." In assessing the significance of prejudice to the defense under the Due Process Clause, it also is important to bear in mind that criminal defendants often are required to respond to pending charges despite the unavailability of evidence potentially useful to their defenses. For example, although criminal defendants may subpoena witnesses to testify on their behalf, they are not entitled to immunity from trial simply because the person against whom the subpoena was directed is beyond the jurisdiction of the court and refuses voluntarily to return or because the person cannot be located. Neither is a defendant's right to a fair trial violated if persons believed to possess information useful to the defense refuse to make that information available because of possible self-incrimination. See, *e.g.*, *United States* v. *Morrison*, 535 F. 2d 223, 228–229 (C.A. 3). In all of these instances, the interest of the defendant in presenting the most effective defense possible is subordinated, consistently with the Due Process Clause, to other interests of a more compelling nature.

[21] The fact that a showing of governmental overreaching or bad faith is not required to gain a new trial following the suppression of material evidence favorable to the defense (see *United States* v. *Agurs*, *supra*, slip op. 12–13; *Brady* v. *Maryland*, *supra*, 373 U.S. at 87) does not support the proposition that pre-accusation delay may offend the Due Process Clause even if not engaged in by the

One of the purposes of statutes of limitation, which stand as "the primary guarantee against bringing overly stale criminal charges" (*United States* v. *Ewell, supra,* 383 U.S. at 122), is to guard against the possibility that the passage of time may impair the ability to mount an effective defense. They also serve the more general function of balancing society's interest in equitable law enforcement and the interest of potential defendants in not having to defend against charges of long-past criminal conduct. In performing these functions, statutes of limitation may have "the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity" (*Toussie* v. *United States,* 397 U.S. 112, 115).[22] But

government to prejudice the defense. A conviction obtained following suppression by the prosecution of material evidence favorable to the defendant violates the Due Process Clause both because of the direct connection between such conduct and the integrity of the verdict and because the suppression of such evidence is never justified by any overriding public policies. But unless the prosecution has delayed accusation for the purpose of prejudicing the defense, or perhaps proceeded in reckless disregard of circumstances known to it calling for the expeditious bringing of charges (see n. 25 *infra*), the occurrence of prejudice to the defense because of pre-accusation delay is simply fortuitous. And the remedy for a *Brady* violation is the award of a new trial at which guilt or innocene may be fairly determined, not the severe remedy of barring adjudication of the charges that results from a finding of impermissible delay. As noted, moreover, delaying formal accusation beyond the point at which it might have been possible to charge the defendant often serves substantial public policies and benefits potential defendants.

[22] The possibility that evidence may become unavailable and thus successful prosecution may become more difficult if formal criminal proceedings are delayed provides an additional, and often quite strong, incentive to prompt action by law enforcement personnel. This diminishes the practical need for strict rules against pre-accusation delay.

whether such investigation is fruitful or not, and despite the possibility that in particular cases the passage of time may not have prejudiced the ability to present all relevant evidence, statutes of limitation afford a measure of predictability by specifying the point at which a general policy of repose outweighs the desirability of further use of the criminal process.[23] See, *e.g., Bridges* v. *United States,* 346 U.S. 209, 215–216.

[23] Even before the first ten amendments to the Constitution had been ratified, Congress enacted a federal statute of limitations. That statute imposed a three-year limit on the filing of charges in capital cases and a two-year limit on the filing of charges in non-capital cases. 1 Stat. 112, 119. In 1876, Congress extended the general limitation applicable to non-capital offenses to three years (19 Stat. 32, 33) and in 1954 extended it to five years (68 Stat. 1145, 18 U.S.C. 3282). In 1939, Congress removed the time limitation as to treason and other capital offenses. 53 Stat. 1198, 62 Stat. 827; 18 U.S.C. 3281. See generally Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecutions*, 102 U. Pa. L. Rev. 630 (1954).

Congress also has enacted several statutes of limitation to govern special circumstances and offenses. By the Act of March 26, 1804, 2 Stat. 290, Congress provided that indictments for offenses arising under the customs and slave trade laws could be returned at any time within five years of the commission of those offenses. 18 U.S.C. 3283. A statute enacted by Congress in 1914 bars prosecution for criminal contempt unless such prosecution is begun within one year of the violation. 38 Stat. 740, 18 U.S.C. 3285. In 1921, Congress extended the general limitations period for defrauding the government from three to six years in recognition of the fact that complex cases arising from World War I made such extension necessary. 42 Stat. 220; H.R. Rep. No. 365, 67th Cong., 1st Sess. (1921). After those cases had been disposed of, Congress again shortened the limitations period to three years. 42 Stat. 51. During World War II, Congress enacted a special statute of limitations governing fraud against the government in time of war, suspending until the termination of hostilities the three-year limitation applicable to those offenses. 56 Stat. 747; 58 Stat. 649, 667; 58 Stat. 765, 781; 18 U.S.C. 3287.

Certain tax offenses may be charged up to six years from their commission. 68A Stat. 815, 26 U.S.C. 6531. The offense of concealing a bankrupt's assets is deemed to be a continuing offense until the bankrupt is finally discharged or discharge is denied. 62 Stat. 828, 18 U.S.C. 3284. In 1950, Congress enacted a statute providing that violations of the espionage laws could be charged within ten years of those offenses. 64 Stat. 1005, 18 U.S.C. 792 (note). Congress extended the period for prosecuting passport offenses in 1951 after finding that most violations of the passport laws were not discovered until after the previously applicable three-year limitation had expired. 65 Stat. 107, 18 U.S.C. 3291; S. Rep. No. 384, 82d Cong., 1st Sess. 1–2 (1951).

Statutes of limitation thus represent a generalized approach to the permissibility of pre-accusation delay and reflect a legislative assessment of the fairness of bringing the machinery of government to bear upon individual citizens. In the usual case, judicial scrutiny of pre-indictment or pre-arrest delay under the Due Process Clause, as this Court has interpreted that constitutional provision, would involve the courts in the same process. Whether pre-accusation delay were judged by the courts in light of "fundamental fairness" or the "community's sense of fair play and decency," the courts would have to weigh the same factors weighed by Congress in enacting statutes of limitation. Absent extraordinary circumstances, not present here, "[s]uch legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay." *Dickey* v. *Florida, supra,* 398 U.S. at 47 (Brennan, J., concurring).

We acknowledge again, however—as we did in *Marion*—that pre-accusation delay by the government designed to deprive the defendant of a fair trial, and having that effect,[24] violates the Due Process Clause even if the prosecution is brought within the applicable statute of limitations. See, *e.g., Dickey* v. *Florida, supra,* 398 U.S. at 46, 51 (Brennan, J., concurring); *Pollard* v. *United States,* 352 U.S. 354, 361; *United States* v. *Provoo,* 17 F.R.D. 183 (D. Md.), affirmed *per curiam,* 350 U.S. 857.[25] Statutes of limitation represent a legislative balancing of legitimate interests in fair and even-handed law enforcement; they were not intended to immunize from constitutional challenge law enforcement efforts, however unfair, occurring within the applicable limitations period.

The fact that statutes of limitation "represent legislative assessments of relative interests of the State

[24] The reason that a defendant who is able to show that the government delayed accusing him to gain an improper tactical advantage must also demonstrate that the delay impaired his ability to defend is simply to avoid conferring a windfall upon the defendant at society's expense. If the misconduct fails to achieve its intended objective of depriving the defendant of a fair trial, the Due Process Clause does not require the termination of the prosecution. The law has provided other remedies for such misconduct, short of immunizing from even a fair trial one who may be guilty of criminal conduct. See, *e.g., Imbler* v. *Pachtman,* 424 U.S. 409, 428–429; *O'Shea* v. *Littleton,* 414 U.S. 488, 503; *United States* v. *Acosta,* 526 F. 2d 670 (C.A. 5), certiorari denied June 7, 1976, No. 75–1368.

[25] A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense. Nothing in this case suggests that respondent could establish a delay of this nature.

3. A basically ad hoc approach to pre-accusation delay would entail unacceptable costs to the criminal justice system without providing assurance of fairer results than those produced by application of the relevant statute of limitations

and the defendant in administering and receiving justice" (*United States* v. *Marion, supra,* 404 U.S. at 322) does not, of itself, necessarily mean that courts should refrain from reassessing those interests on a case-by-case basis—even when prosecutorial misconduct is not at issue. We believe, however, that there are sound reasons why courts should refrain. A basically *ad hoc* approach to the permissibility of pre-accusation delay would entail enormous costs to the criminal justice system—without, in the vast majority of cases, providing assurance of fairer results. Furthermore, an *ad hoc* approach would require courts to engage in lengthy hearings and to resolve a variety of essentially policy disputes that transcend the individual case.

The difficulties inherent in a basically *ad hoc* approach to pre-accusation delay begin with the need to ascertain at what point the government reasonably might be charged with having "delayed" formal accusation. The court of appeals' decision in the present case is premised in part on the notion that "delay" chargeable to the government commences

whenever the government possesses sufficient evidence to warrant submission to a grand jury. In many cases, the making of such determination would involve nearly insuperable problems of proof. Prosecutors can hardly be expected continuously to reassess the status of individual cases as each new piece of evidence is discovered. Neither can they be expected in every case to keep detailed records from which it could readily be ascertained when evidence accumulated to the point of probable cause to believe that a particular person committed the offense of which he is later accused. And even if it were possible to reconstruct the course of an investigation in the kind of detail the court of appeals' decision would require, fixing the point at which the government might successfully have sought an indictment would place courts in the unenviable position of having to divine the likely reaction of members of a hypothetical grand jury to evidence possessed by the government at various points in time.[26]

[26] In determining the point at which the government successfully might have sought an indictment against respondent, the panel majority relied in part on testimony from the postal inspector responsible for investigating the thefts from the Terminal Railroad Association. The postal inspector had testified at the hearing on respondent's motion to dismiss to the effect that "he would have recommended the prosecution of this case and presentation of the evidence to the grand jury based on the information contained in the report submitted to the United States Attorney on October 2, 1973" (Pet. App. 4a). Although such a recommendation may be useful to prosecutors in deciding whether and when to seek formal charges, an investigating officer is not in a position to make a valid assessment of the complex of factors that must be considered in making such decisions. Consequently, a recommendation such as that relied upon by the panel majority is hardly entitled to conclusive weight in determining the point at which charges should have been brought.

Given the court of appeals' view of the Due Process Clause, moreover, the court's premise that delay chargeable to the government begins whenever the government possesses sufficient evidence to indict is too restricted. If the court is correct in construing the Due Process Clause as embodying a prompt accusation requirement, it makes little sense to limit that duty to government prosecutors. Potential defendants may be adversely affected by "delay" in the discovery and investigation of criminal conduct as well as by "delay" following the accumulation of evidence establishing probable cause. In fact, since potential defendants often do not learn that they may be called upon to defend against criminal charges until the point at which an investigation begins to focus upon them, requiring such investigations to proceed efficiently and expeditiously would seem to be an inevitable concomitant of the court of appeals' approach.[27] The obvious difficulties that would attend judicial efforts to supervise the conduct of criminal investigations, by reviewing them at the behest of defendants after

[27] Indeed, it is difficult rationally to distinguish respondent's position from the position he would have been in had evidence of the offenses charged in the indictment not been discovered for seventeen months. But with the possible exception of the Eighth Circuit's recent decision in *United States* v. *Barket*, *supra*, we know of no case holding that a defendant's right to due process may be violated if evidence is lost during a period when the prosecuting authority was unaware of the apparent violation of the criminal laws.

formal accusation and dismissing criminal charges stemming from investigations not conducted with satisfactory dispatch, would have serious import for the administration of criminal justice. Cf. *United States* v. *Russell, supra,* 411 U.S. at 435.

An additional difficulty inherent in recognition of a general prompt accusation requirement under the Due Process Clause is that lengthy hearings—similar in character to the trial itself—would be necessary before the pertinent determinations could be made with any assurance. In fact, whether the court's ultimate decision rested on the Sixth Amendment or the Fifth Amendment, the practical problems that would be created by efforts to identify the point at which the police could have arrested or the prosecutor could have charged would be essentially the same. As this Court noted in *Marion,* in discussing those problems in the context of the Sixth Amendment (404 U.S. at 321 n. 13; quoting approvingly from *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial* 23 (Commentary to Rule 2.2(a), p. 23 (Approved Draft, 1968)):

> To recognize a general speedy trial right commencing as of the time arrest or charging was possible would have unfortunate consequences for the operation of the criminal justice system. Allowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof. As one court said, "the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting

> authorities had proceeded diligently or otherwise" [*United States* v. *Port,* Crim. No. 33162 (ND Cal., June 2, 1952); quoted in Note, *Justice Overdue—Speedy Trial for the Potential Defendant,* 5 Stan. L. Rev. 95, 101–102 n. 34].

The Eighth Circuit's approach to pre-accusation delay ignores the considerations discussed above and requires courts to attempt to pinpoint the precise moment at which the government might successfully have sought an indictment. It then holds society accountable, by the stringent measure of dismissing the pending criminal charges, for the loss thereafter of evidence favorable to the defense. In addition to involving perhaps insuperable practical difficulties, this approach to pre-accusation delay would upset the balance struck by Congress in enacting statutes of limitation—a balance that takes into account the variety of institutional considerations that may delay formal accusation, recognizes that some delay between the commission of offenses and the bringing of charges is a necessary and desirable part of the criminal process, and, after the expiration of a fixed period of time, eliminates further exposure to criminal sanction for those acts Congress has proscribed. Absent a showing that the government delayed formal accusation to secure an improper tactical advantage over the accused, we submit that the bringing of criminal charges within the period allowed by the applicable statute of limitations comports with the requirements of due process.

B. ANY PRE-ACCUSATION DELAY THAT OCCURRED IN THIS CASE DID NOT VIOLATE THE DUE PROCESS CLAUSE

The statute of limitations applicable to the offenses for which respondent was indicted authorizes the bringing of criminal charges at any time within five years following the commission of those offenses. 18 U.S.C. 3282.[28] As already noted, the indictment was returned within 20 months of the dates of the alleged offenses. Respondent has neither alleged nor sought to show that the government delayed charging him in order to secure an improper tactical advantage.[29] In these circumstances, we submit that the timeliness of the charges against respondent was governed solely by the applicable statute of limitations and that the courts below therefore erred in dismissing certain of those charges because of pre-accusation delay.

In holding that the government had delayed unreasonably in charging respondent, the panel majority acknowledged that the government was seeking during the period of the "delay" to identify persons in addition to respondent who may have participated in the offenses specified in the indictment (Pet. App. 5a).[30] Moreover, the three counts of the

[28] 18 U.S.C. 3282 states that, "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

[29] Neither did respondent allege or seek to show that the government had misled him into believing that he would not be charged and that he had relied upon that belief to his detriment (see Pet. App. 9a (Henley, J., dissenting)).

[30] We stress again our belief that a decision by the government to delay formal accusation pending further investigation should never be considered to violate due process standards. See discussion at pp. 24–25, *supra*.

indictment dismissed by the court charged respondent with unlawfully possessing eight handguns stolen from the mails, in violation of 18 U.S.C. 1708 (A. 3–4). An essential element of the government's affirmative case with respect to those offenses was proof that respondent had known that the handguns were stolen. *Barnes* v. *United States,* 412 U.S. 837, 847. Respondent admitted that he had possessed the handguns, but he denied having known that they had been stolen (A. 24). Although the government believed otherwise, it did not have direct evidence of respondent's guilty knowledge. The theory upon which the government was proceeding, supported only by circumstantial evidence, was that respondent's son had stolen the guns and had given them to respondent to sell (see n. 7, *supra*).

Thus, this is not a case in which the government possessed at some point overwhelming evidence showing that a particular individual had engaged in criminal conduct—and in which ensuing pre-indictment delay thus might have been consistent with an assertion that the purpose of the delay was to secure an improper tactical advantage. It is hardly improper for the government to delay formal accusation until it has evidence demonstrating with fair assurance that the person believed to have committed a criminal offense did so in fact. Indeed, as Mr. Justice Powell has pointed out, "[g]ood police practice often requires postponing an arrest, even after probable cause has been established, in order to * * * develop further evidence necessary to prove guilt to a jury" *United*

States v. *Watson, supra,* 423 U.S. at 431 (concurring). In light of respondent's failure to allege in his motion to dismiss that any delay in accusing him was improperly motivated, and in the absence of evidence showing that it was so motivated, any pre-accusation delay that occurred here did not offend the Due Process Clause.

II.

A DISTRICT COURT SHOULD RESERVE RULING ON A DUE PROCESS CLAIM BASED UPON PRE-ACCUSATION DELAY, AND ALLEGING BOTH GOVERNMENTAL MISCONDUCT AND CONSEQUENT PREJUDICE, UNTIL THE CONCLUSION OF TRIAL

The decision in this case also departs from previously accepted standards by endorsing a procedure for resolving due process claims based upon pre-accusation delay that, in practical effect, significantly dilutes the requirement that the defendant demonstrate that the delay caused actual and substantial prejudice to his ability to defend against the charges. While it may sometimes be feasible, and not unduly burdensome, for a court to determine with assurance prior to trial whether the government sought to delay formal accusation in order to secure an improper tactical advantage, the same will seldom be true of allegations of defense prejudice. At a minimum, requiring the government to respond, prior to trial, to allegations that a particular delay impaired the accused's ability to defend against the charges will require a dress rehearsal of the trial itself. The resulting expenditure of judicial and prosecutorial resources, the delay in commencement of the trial,

and the inevitable inconvenience to witnesses and others, is not required to vindicate the policies served by the Due Process Clause.[31]

Although the Due Process Clause provides a basis for reversing criminal convictions resulting from trials lacking in fundamental fairness, it does not ordinarily afford any protection against being required to stand trial.[32] Due process claims based upon pre-accusation delay are, in that respect, significantly unlike a number of other constitutional claims arguably invoking a right not to be tried[33]—claims that are, as a consequence, appropriately dealt with by trial courts whenever possible prior to trial (cf. *Cohen* v. *Beneficial*

[31] Our concern here is with claims of pre-accusation delay that allege both governmental misconduct and consequent prejudice to the defense. If we are correct in believing that the Due Process Clause is not violated unless there has been both governmental misconduct and defense prejudice, a motion that fails to allege either misconduct or prejudice should of course be denied by the court prior to trial.

[32] As this Court noted in *Cobbledick* v. *United States*, 309 U.S. 323, 325, although "[a]n accused is entitled to scrupulous observance of constitutional safeguards", "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." Cf. *Frisbie* v. *Collins*, 342 U.S. 519.

[33] As assertion that trial would offend the Double Jeopardy Clause is perhaps the clearest example of a claim invoking a right not to be tried. See *Breed* v. *Jones*, 421 U.S. 519, 532–533; *Green* v. *United States*, 355 U.S. 184, 187–188. Other claims arguably of a similar nature include claims under the Speech and Debate Clause (Article I, Sec. 6, cl. 1), which provides that a member of Congress "shall not be questioned in any other Place" for his official acts (see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491; cf. *Gravel* v. *United States*, 408 U.S. 606); a claim that trial is part of an effort on the government's part to "chill" the exercise

Industrial Loan Corp., 337 U.S. 541, 546). Motions seeking relief from pre-accusation delay allegedly offending the Due Process Clause are, moreover, virtually unique in the extent to which their resolution depends upon events of the trial itself.

Motions filed by defendants prior to trial (apart from those involving some aspect of discovery) generally seek either to avoid trial because of an alleged defect in the institution of the proceedings or to bar the admission of certain evidence. Rule 12(e) of the Federal Rules of Criminal Procedure requires trial courts to rule upon all such motions before trial, unless the court has "good cause" for deferring its determination.[34] Since most pre-trial motions can be dealt with almost as easily prior to trial as after trial, and since the parties have a shared interest in avoiding the occurrence at trial of prejudicial error, good cause seldom exists for reserving ruling. For example, a court confronted with a claim that a search and seizure violated the Fourth Amendment or that a confession was obtained illegally can focus its inquiry quite narrowly on the specific events surrounding the search

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of First Amendment rights (see *Dombrowski* v. *Pfister*, 380 U.S. 479; cf. *Allee* v. *Medrano*, 416 U.S. 802); and claims that the prosecution is racially discriminatory (cf. *Oyler* v. *Boles*, 368 U.S. 448; *Yick Wo* v. *Hopkins*, 118 U.S. 356).

[34] Rule 12(e) of the Federal Rules of Criminal Procedure provides in pertinent part that "[a] motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected." Because of this provision, motions challenging pre-accusation delay should not be granted during trial.

and seizure or the giving of the confession. In ruling upon such claims, moreover, the court need be apprised of the details of the offense with which the defendant is charged only insofar as those details bear upon the admissibility of the particular evidence at issue. Even more importantly, failure to rule upon such claims in a timely fashion may impair the government's right to appeal an adverse ruling, in violation of Rule 12(e) of the Federal Rules of Criminal Procedure, or inject reversible error that would require a second trial in the event the defendant is convicted. Moreover, events of the trial are unlikely to affect the appropriate disposition of most Rule 12 motions.

A motion to dismiss charges under the Due Process Clause because of pre-accusation delay presents a quite different situation. Even if the government delayed accusation in an effort to obtain an improper strategic advantage, the defendant is not entitled to have the charges against him dismissed unless he can demonstrate that the delay substantially prejudiced his ability to defend against the charges. *United States* v. *Marion, supra,* 404 U.S. at 324–326; and see n. 24, *supra.* But making that determination prior to trial inevitably entails considerable speculation about the nature and impact of evidence claimed to have been "lost" to the defense and the strength and character of the evidence available to the government at trial.

The issue of prejudice thus can be reliably determined only by reviewing all the evidence available to both sides—that is by the trial itself or by having a

"trial-before-the-trial." The latter course is undesirable in various respects. The evidence introduced by the government at trial may establish the defendant's guilt so overwhelmingly that the loss to the defense of certain evidence is plainly harmless beyond a reasonable doubt. Yet, prior to trial the loss of such evidence may well appear to have prejudiced significantly the defendant's ability to defend himself. Conversely, the evidence available to defense, despite any pre-accusation delay that has occurred, may be sufficient to persuade the jury that the government has not proved the defendant guilty beyond a reasonable doubt of the offenses with which he stands charged. The resulting acquittal would obviate any need for the court to rule on the defendant's due process claim.[35] At the same time, the prejudice asserted by the defendant based upon the loss of evidence may prove, in light of the evidence actually introduced at trial, to be unfounded because the government's theory of the case was other than originally assumed by the defense. The loss of particular evidence thus may be harmless because of its lack of materiality to the facts actually in issue at trial.[36]

[35] As Judge Henley pointed out in the present case (Pet. App. 10a–11a):

> If [respondent] had been put to trial, it would have been open to him to contend before the jury that he had acquired the pistols from Stewart without any guilty knowledge and to urge upon the jury the fact that Stewart's death had deprived [respondent] of the benefit of Stewart's testimony. As it is, [respondent] simply goes free without trial.

[36] In our judgment, the same considerations ordinarily caution against attempting to resolve prior to trial speedy trial claims under the Sixth Amendment. Unlike due process claims based upon pre-accusation delay, a demonstration of prejudice to the defense is neither "a necessary [n]or sufficient condition to the finding of a deprivation of the right of speedy trial" (*Barker* v. *Wingo*, *supra*, 407 U.S. at 533). But at least when the delay, attributable to the government, between formal accusation and trial is not so excessive that only minimal prejudice need be shown, we believe that resolution of a defendant's speedy trial claim should await conclusion of the trial. But see *United States* v. *MacDonald*, 531 F. 2d 196 (C.A. 4), petition for a writ of certiorari pending, No. 75–1892.

The dangers inherent in attempts to resolve due process claims prior to trial are, in fact, graphically illustrated by the decision in this case. At best, the finding of the panel majority on the issue of defense prejudice rests upon unsubstantiated speculation concerning both the nature and strength of the government's case against respondent and respondent's anticipated defense.[37] Respondent made no effort at the

[37] While we disagree with the determination that actual and substantial prejudice was established, we have not asked this Court to review that essentially factual conclusion, but rather the broader question of whether it was proper for the court to have attempted to resolve that issue prior to trial.

It is clear, however, that respondent's showing of prejudice fell far short of the showing that would have been required in other circuits to establish a violation of due process. See, *e.g.*, *United States* v. *McGough*, 510 F. 2d 598, 604 (C.A. 5) (mere allegation that several potential witnesses had died and that memories of others had faded held to constitute an insufficient showing of prejudice absent evidence of their potential utility to the defense); *United States* v. *Galardi*, 476 F. 2d 1072, 1075 (C.A. 9) (unexplicated claim that missing person might have been useful to the defense held insufficient); *United States* v. *Dukow*, *supra*, 453 F. 2d at 1330 (deaths of two potential witnesses insufficient to establish prejudice where the defense failed to show what their testimony would have been).

hearing on his motion to dismiss to explain what information his brother or Tom Stewart might have provided that would have been favorable to his defense. In finding that respondent's ability to defend had been impaired by Stewart's death, the majority below relied upon the contention of respondent's counsel in brief and argument—but not made at or supported by the testimony at the hearing—that "were Stewart's testimony available it would support [respondent's] claim that he did not know that the guns were stolen from the United States mails" (Pet. App. 5a).[38]

But respondent testified at the hearing that he had purchased from Stewart only "two or three" (A. 13) of the eight guns specified in the indictment, and it is by no means clear that Stewart would have been willing to testify on respondent's behalf.[39] As Postal Inspector Wellner's report indicates, moreover, the person to whom respondent sold all eight of the guns (Joe Boaz) admitted during questioning that he had

[38] To establish a violation of 18 U.S.C. 1708, the government need only show at trial that respondent knew that the guns had been stolen—not that they had been stolen from the United States mails. *Barnes* v. *United States*, *supra*, 412 U.S. at 847.

[39] As Judge Henley pointed out in his dissenting opinion (Pet. App. 10a):

> Had Stewart taken the stand and undertaken to exculpate [respondent], he doubtless would have been required to explain his own connection, if any, with the pistols in question, and that connection may well have been highly culpable. [Respondent] could not have compelled Stewart to incriminate himself, and it is unrealistic to believe that Stewart would have done so voluntarily simply to aid or accommodate [respondent].

known that the guns were "hot" when he resold them (A. 24). At trial, Boaz presumably would have been asked from whom he received that information, and since he had purchased the guns from respondent, the answer could well have shown that respondent also knew that the guns had been stolen.

By countenancing resolution of respondent's due process claim prior to trial, the majority of the court below ignored the procedures suggested by this Court in *Marion*. In that case, as here, the defendants relied "solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost" (404 U.S. at 325–326). This Court concluded, however, that while "[e]vents of the trial may demonstrate actual prejudice, * * * at the present time [defendants'] due process claims are speculative and premature" (*id.* at 326). The enhanced ability to make a sound assessment of claims of prejudice after trial, combined with the substantial economy of judicial and prosecutorial resources that will be accomplished by avoiding a lengthy pretrial hearing that inevitably will be largely duplicative of the trial itself (cf. *United States* v. *Calandra*, *supra*, 414 U.S. at 349–352; *United States* v. *Dionisio*, 410 U.S. 1, 17),[40] prove the soundness of

[40] Claims of defense prejudice based upon pre-accusation delay are easy to make and exceedingly difficult to refute, particularly prior to trial. As Judge Henley pointed out in his dissent in the present case (Pet. App. 9a–10a):

> The record and the briefs disclose that the indictment was returned on March 6, 1975; on March 18, 1975 [respon-

the rule, which we urge this Court to adopt, requiring that claims of prejudice such as respondent's normally be resolved after trial."[41]

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dent] filed his motion to dismiss; and a hearing was held on the motion on April 25, 1975. In his brief counsel for [respondent] states that his client testified that Stewart had died about six months prior to the hearing. If so, Stewart had ceased to be a source of danger to [respondent], if he ever was, when the motion was filed. Nevertheless, no mention of Stewart or his "lost testimony" is made in the motion, and there is no allegation of specific prejudice in the motion except the assertion that [respondent] had suffered "anxiety and concern" since his statement had been ttaken in 1973. The name of Stewart seems to have come up for the first time when [respondent] testified in support of his motion. In the circumstances, one may suspect that the claim of prejudice based on the death of Stewart was nothing but a fabrication, and that had Stewart been alive [respondent] could just as well have relied on the recent death of any other of his acquaintances, claiming that he had innocently acquired the pistols from that acquaintance.

Even when the prospect of a favorable ruling is *de minimis*, the practice of ruling prior to trial on motions such as respondent's provides defendants with a powerful incentive for filing such motions. The motion may be denied following a pre-trial hearing, but the defendant will have obtained a preview of the government's case in the form of evidence showing that the defendant could not have been prejudiced by any pre-accusation delay that occurred. Thus, motions such as respondent's may serve to avoid restrictions on the discovery permitted criminal defendants prior to trial. See, *e.g.*, 18 U.S.C. 3500; Rule 16, Fed. R. Crim. P.; cf. *United States* v. *Mandujano*, *supra*, 425 U.S. at 595 n. 12 (Brennan, J., concurring).

[41] In the event of a guilty verdict, trial courts could rule on motions such as respondent's, as well as any other motions deferred for good cause, prior to entering judgment on the verdict.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded with instructions to reinstate the indictment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1844

UNITED STATES,

Petitioner,

v.

EUGENE LOVASCO, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether a defendant who seeks the dismissal of criminal charges under the Fifth Amendment Due Process clause because of pre-accusation delay may either show that the delay impaired his ability to defend against the charges, or that the government sought the delay to secure an improper tactical advantage.

2. Whether a District Court should reserve ruling on a due process claim based upon pre-accusation delay, and alleging prejudice, until after trial.

STATEMENT

In accordance with Supreme Court Rule 40(3), respondent supplies facts here that are necessary in correcting certain inaccuracies or omissions of the statement of the case supplied by the government.

The government states in its brief that the record reflects that the government stipulated that the investigation of the thefts continued after September, 1973 (Brief, p. 3). The record actually reflects the following stipulation made by respondent's counsel:

> [T]hat since the statement was taken on September 26, 1973, that the only additional work the—the only additional witness the Government had was in January, 1975, a witness who allegedly was offered the purchase of a gun and that said purchase did not take place. (A. 9).

This additional evidence of a sale of a pistol was received on March 6, 1975 (A. 19). The United States Attorney stipulated that he had already scheduled the presentment to the grand jury of his evidence against respondent on March 6, 1975, and received the additional information after the grand jury proceeding (A. 19).

The following record and stipulation by the government was made (A. 19):

> Q. (Mr. Gilden) Now, would it be fair to say, Mr. Wellner,[1] that without this evidence that you would received in March of '75 you would have still recommended the prosecution of the matter and presentation to the Grand Jury? . . . .
>
> Mr. Coughlin: Your Honor, I might stipulate to this. The matter was on the docket for the Grand Jury before we received this information. We were going to the Grand Jury without that information.
>
> The Court: In March?

[1] G.P. Wellner, the Postal Inspector.

> Mr. Coughlin: In March, I received the information the morning of the Grand Jury itself; therefore we had gone to the Grand Jury. (A. 19).

Contrary to the unsupported statement of the government that investigation of the thefts continued, the only evidence supplied to the District Court was Wellner's testimony that he talked to Coughlin and Adelman of the United States Attorney's office on four or five occasions (A. 20). There is no evidence to show whether some of these conversations were before the Investigative Report of October 2, 1973, and further there is no evidence supplied by the government as to the substance of these conversations.[2] Wellner did testify that he did not supply any written supplemental material to the United States Attorney after the report of October 2, 1973 (A. 19).

The government acknowledges that there were no witnesses found after September 26, 1973, as to the matters in the Postal Inspector's report (D. Exh. A, A. 21-26; A. 9-10). The Postal Inspector's report dated October 2, 1973, names respondent as the offender, as well as the nature of the offense, the possession of eight stolen handguns,[3] and reflects that on September 26, 1973, respondent gave his statement to the government. He stated that he visited his son at the mail facility of the Terminal Railroad Association, and after the visit, he returned to his unlocked automobile, where he found a sack of four or five Browning pistols,

[2] One may hypothesize that the conversations were calls by Wellner to the United States Attorneys requesting them to hurry up and prosecute respondent, since respondent had been calling him showing anxiety as to what was going to happen to him (A. 18).

[3] The same 8 handguns in the indictment. Count I and Count II each refer to possession of one pistol, and Count III refers to possession of the remaining 6 pistols.

apparently placed there by an unknown person during his visit. He admitted that he kept the pistols for a few days and then sold them to Boaz, but denied the sale of all eight pistols to Boaz (A. 24).

Respondent testified at the pre-trial hearing on the Motion to Dismiss the Indictment that since September 26, 1973, two witnesses died. One was a Tom Stewart, who died about six months before the hearing on the Motion on April 25, 1975, which would be abou. November, 1974, or better than a year after th. completion of the investigation, and the other was his brother, Tom Lovasco, who died of cancer in April, 1974, or about seven months after the completion of the investigation (A. 11).

Tom Stewart was a switchman, and although the government states he would not have had access to insured mail parcels in the normal course of his duties (Brief, p. 6, n. 6), there is no evidence to support this allegation. The report of the Postal Inspector merely states that respondent would not have access to the involved insured parcels in the normal course of his duties as a switchman.

Respondent testified that he obtained two or three of the guns for Boaz from Stewart, and that he didn't tell Inspector Wellner that he obtained the guns from Stewart because this guy [Stewart] was a bad tomato, for he was liable to take a shot at him if he told the Inspector (A. 13).

Respondent also testified that his deceased brother, Tom Lovasco, was employed by Florissant Dodge, the same employer of Joe Boaz. That his brother, who introduced him to Boaz, was present during all of the gun transactions (A. 11).

Thus, it is apparent that Stewart, had he been alive, would have testified that respondent was not told by him of the source of the guns he provided to

respondent, and thus corroborate respondent's testimony that he did not know the guns were stolen. Further, the brother, if alive, could testify as to all of the transactions with Boaz, which would establish the nature and the number of transactions.

The United States Attorney told the District Judge that the government theorized that the guns came from respondent's son (A. 13). Respondent denied that he had obtained any of the guns from his son (A. 13). Respondent testified that he was told by a Federal agent at the time that he gave his statement that he was protecting his son. A discussion ensued between the agent and respondent about protecting one's son, and respondent stated that if his son was in trouble, he would protect him. Respondent's son gave a statement to the Mail Inspector on September 26, 1973, as well, in which he denied any responsibility for the theft of the parcels (A. 24). In fact, the Inspector's report stated there was no evidence at the time of the report that the son was responsible for the depredations.

The Postal Inspector acknowledged that respondent called him after submission of his report on approximately five to six occasions and expressed concern as what was going to happen to him (A. 16, 18).

The government produced no evidence at the hearing or in the report reflecting that the investigation continued, or in any way incriminated respondent's son.

On October 8, 1975, the District Judge dismissed the four Counts of the Indictment and held that as of September 26, 1973, and in any event, no later than October 2, 1973, the government had all of the information relating to respondent's alleged commission of the offenses charged against him, but did not charge respondent or present the matter to the grand jury until more than 17 months thereafter on March 6, 1975. The Court held that defendant was prejudiced as a result of

the death of Tom Stewart, a material witness in his behalf, and that the government's delay had not been explained or justified and that it was unnecessary and unreasonable (Pet. App. 14).

On February 26, 1976, a divided panel of the Eighth Circuit, consisting of Justice Clark and Judge Bright affirmed the dismissal of three of the Courts relating to possession of stolen mail matter, but reinstated Count IV relating to dealing in firearms without a license.

The majority of the divided panel agreed with the District Judge, and held that the delay was unreasonable and there was prejudice to respondent's ability to defend against the charges. That respondent had been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf.

The Appeals Court rested its decision on *United States v. Jackson*, 504 F.2d 337 (8th Cir. 1974), which based its decision on *United States v. Marion*, 404 U.S. 307 (1971), that unreasonable pre-accusation delay, coupled with prejudice to the respondent, may violate the Fifth Amendment.

It is to be noted that the Appeals Court opinion includes the government's contention that the delay in the prosecution resulted from awaiting results of further investigation, which might have implicated the person or persons who may have stolen the mailed matter (Pet. App. 4a). The Court's opinion, thus, incorporated the theory of the case set out by Coughlin, the United States Attorney, in the District Court, and attempts to give the government some reason for the delay, although there was no evidence presented in the record of the District Court to support the government's position.

SUMMARY OF ARGUMENT

I

The criteria for proving a violation of the Fifth Amendment Due Process Clause under *United States v. Marion, supra,* is either that there was unreasonable pre-accusation delay coupled with prejudice to the defendant's rights to a fair trial, or that the delay was an intentional device by the government to gain a tactical advantage over the accused. The Eighth Circuit's decision here is totally in accord with this Court's ruling in *United States v. Marion, supra.*

A. The Eighth Circuit found that the government had all of the information relating to the commission of the offenses no later than October 2, 1973, that the government did not present the matter to the grand jury until more than seventeen months later, that respondent was prejudiced in his defense against the charges by the death of a material witness, and that the government did not explain or justify its delay. The government has not raised any question about these findings to this Court. These uncontested findings should establish a Fifth Amendment Due Process claim for pre-accusation delay under *United States v. Marion*. In fact, the government conceded in its brief before the Eighth Circuit that pre-indictment delay may be the basis for dismissal of an indictment if the delay was unreasonable and the defendant shows sufficient prejudice as to be a due process violation.

B. The government's position here that respondent must prove that the delay was an intentional device to gain a tactical advantage as part of a Fifth Amendment Due Process claim based on pre-accusation delay is an impossible burden of proof for a defendant.

Where the respondent proved pre-accusation delay and actual prejudice which would impede a fair trial,

and the government made no effort to explain or justify its delay, this should satisfy the criteria for establishing a Fifth Amendment Due Process claim. Where the government completed its case on October 2, 1973, and did nothing further for seventeen months, this was a deliberate and avoidable choice, and if there is resultant material prejudice to the defendant because of this delay, this prejudice was foreseeable to the government, and should be the basis for the dismissal of an indictment on Fifth Amendment Due Process grounds.

C. The District Court has the inherent discretionary power from the common law to dismiss a case for want of prosecution. Since the government presented no evidence to justify, explain or show any necessity for its lengthy delay, and since there was resultant material prejudice to respondent, the District Judge's discretionary power to dismiss should not be interfered with.

D. The standards of *Barker v. Wingo*, 407 U.S. 514 (1972) may be used as guides in determining actual prejudice in a pre-accusation delay Fifth Amendment Due Process claim. There is no necessity to prove bad faith in order to have a violation of due process, and this would obviate the need to show prosecutorial overreach, which requirement is argued by the government.

The actual prejudice, which was proven, was the death of a witness Tom Stewart, who could have testified that respondent did not know that certain guns were stolen, a vital element of proof necessary to establish guilt under the three Counts dismissed by the Appeals Court. The death of the witness occurred about one year after the completion of the investigation, and he would have been available to testify at an early trial. In addition, the government through its seventeen

months of inertia had to anticipate that there would be a high probability of prejudice.

The government's policy argument, that a continuing investigation benefits the person suspected and society generally, is not supported by the facts here for the government presented no evidence to justify or explain its delay, and all of the evidence the government had on October 2, 1973, to indict respondent was the same evidence presented to the grand jury in March, 1975.

E. 1. Based on the government's actions which it has candidly characterized as simple inertia, respondent has lost vital material evidence which would affect the outcome of a trial. Many cases decided by this Court support that the loss of evidence that would insure a fair trial to a defendant would be the basis of a due process claim where the loss of evidence occurred through the fault of the government.

The government's argument that the Court of Appeals' decision interferes with the functioning of the grand jury does not fit the facts here, for the United States Attorney had no new evidence to present to the grand jury in March, 1975, other than the report of October 2, 1973.

2. The Statute of Limitations does not fully define respondent's rights where a Fifth Amendment Due Process claim is made for pre-accusation delay. The limitations question cannot foreclose a Fifth Amendment attack, and requires the District Court to assess on a case by case basis the delicate judgment that requires defendant have a fair trial.

3. The government argues against an ad hoc approach to pre-accusation delay where there has not been prosecutorial overreach, since there would be a need to ascertain at what point the government delayed formal accusation.

The District Court found that no later than October 2, 1973, the government had all of the information relating to the alleged commission of the offenses. There was no reason or excuse given by the government for the delay. Thus, on the facts here the government had the evidence for probable cause to prosecute respondent as of October 2, 1973. An early prosecution would have enabled respondent to adequately prepare his defense.

This case establishes a classic example of prosecutorial inaction with resultant prejudice. The issue of a Fifth Amendment Due Process claim based on pre-accusation delay must be made on an ad hoc basis.

II

The government argues that the hearing on the Motion to Dismiss based on the pre-accusation delay and prejudice should await the outcome of the trial. The government never made this request to the District Court, and the government's "question" here actually represents a request for an advisory opinion.

The hearing before the District Court here took a very short time. The issues were narrowly confined to delay and prejudice. Thus, the government's claim that the pre-trial Motion is a dress rehearsal for the trial has no merit.

The denial of a fair trial in view of prejudice, economy of money to the defendant and economy of time to the Court would demand that this Motion be taken up before trial. Further, the House Committee on the Judiciary stated Courts should be discouraged from ruling on pre-trial Motions until after verdict. The District Judge committed no error in deciding this Motion prior to trial.

ARGUMENT

I

A DEFENDANT SEEKING THE DISMISSAL OF CRIMINAL CHARGES UNDER THE FIFTH AMENDMENT DUE PROCESS CLAUSE BECAUSE OF PRE-ACCUSATION DELAY MAY EITHER SHOW THAT THE DELAY IMPAIRED HIS ABILITY TO DEFEND AGAINST THE CHARGES, OR THAT THE GOVERNMENT SOUGHT THE DELAY TO SECURE AN IMPROPER TACTICAL ADVANTAGE.

A. The decision of *United States v. Marion*, requires that the defendant prove actual prejudice by reason of the pre-accusation delay in order to have an indictment dismissed and this requirement has been satisfied here by the death of a material witness during a 17 month unexplained delay.

United States v. Marion, supra, appears to be misconstrued by the government, when it alleged that the dictates under *Marion* demand the satisfaction of two requirements: that the pre-indictment delay caused substantial prejudice to defendant's rights to a fair trial and that the delay was an intentional device by the government to gain a tactical advantage over the accused.[4]

[4] The government's position that the defendant must show that the delay was an intentional device to gain a tactical advantage over the accused to constitute a Fifth Amendment violation is raised for the first time before this Court.

In fact, the government conceded in its brief before the Eighth Circuit:

> Such a delay (pre-indictment) may be the basis for dismissal of an indictment if the delay was unreasonable and the defendant shows sufficient prejudice as to be a due process violation. (P. 3 of Brief).

This is in accord with respondent's position, and is now rejected by the government before this Court.

This Court commented favorably on the government's concession that if these two elements were present, that due process of the Fifth Amendment would require dismissal of the indictment. However, this Court went further, and stated that it would not spell out when and in what circumstances actual prejudice resulting from pre-accusation delay would require a dismissal of the prosecution.[5]

This Court in *Marion* further stated:

> To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily *involve a delicate judgment* based on the circumstance of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases. (at p. 325). (Emphasis supplied).

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[5] See Comment, *The Speedy Trial Guaranty: Criteria and Confusion in Interpreting its Violation*, 22 DePaul Law Review 839, 863 n. 164 (1973):

> It is not clear whether both of these factors need be present for a violation of due process to be recognized. The *Marion* Court in citing these two merely recognized that the government in its brief had conceded that where both were present, then a fifth amendment due process violation would appear. Brief for the Government at 26-27, United States v. Marion, 404 U.S. 307 (1971). Therefore, the mere presence of one of these factors may be enough to show a violation of the fifth amendment. Cf. United States v. Daley, 454 F.2d 505, 508 (1st Cir. 1972), where the court stated: "[s]ince neither actual prejudice *nor* purposeful governmental delay has been shown, the *pre-indictment* time lapse is irrelevant . . . ." (emphasis added) . . . In both the *Marion* and *Barker* cases the delay was an "intentional (tactical device" used by the government to strengthen its case and gain an advantage ov the defendant, however, in neither case did the defendant prove actual prejudice (Marion did not plead actual bu merely "possible" prejudice). Thus, if these two factors are to be considered, or one alone, it appears the showing of actual prejudice, with the burden being on he who pleads it, will be the prime requirement to show a fifth amendment due process violation.

As far as appellees in *Marion, supra,* were concerned, this Court held their prejudice claims were elements present whether before or after arrest, to wit: memories will dim, witnesses become inaccessible, and evidence be lost (*Marion*, at pps. 321, 325). However, this Court refused to accept these possibilities or speculation as a denial of a fair trial to justify a dismissal of the indictment in view of the Statute of Limitations.

This Court then stated that actual prejudice may arise at the trial, which would give rise to a due process claim, but at this time, the due process claims based on the record before the Court were speculative and premature (*Marion*, at p. 326).

Thus, this Court implicitly stated that actual prejudice could be the basis of a due process claim. The other element, the government's delay to gain a tactical advantage over the accused, may represent an alternate ground for demonstrating a violation of due process to justify a dismissal of the indictment.

If there is to be a due process right against unreasonable pre-arrest delays, it would not seem logical to limit the right to intentional delays. It is the delay itself, not its source, which impairs the accused's ability to defend himself.[6]

The government here has not questioned the essential findings of the District Judge and the Appeals Court:

1. that the government had all of the information relating to the commission of the offenses no later than October 2, 1973;
2. the government did not charge or present the matter to the grand jury until more than 17 months thereafter, and that as a result of the delay, respondent has been prejudiced by reason of the death of Tom Stewart, a material witness

---

[6] Note, *Constitutional Limits on Pre-Arrest Delay*, 51 Iowa Law Review 670, 680 (1966).

on his behalf, and thus respondent has been prejudiced as to his ability to defend against the charges; and

3. the government's delay has not been explained or justified and is unnecessary and unreasonable.

The government argues here that the majority of the panel acknowledged that the delay had been occasioned by the government's desire to identify additional persons who may have participated in the thefts. This dictum in the Appeals Court decision came about in oral argument before the Appeals Court:

> The prosecuting attorney has indicated that the Government theorized that the guns in question had come from the accused's son, who worked at the post office, but no charges have been made against him. At oral argument the prosecutor indicated the delay in the prosecution resulted from awaiting results of further investigation which might have implicated the person or persons who may have stolen the mailed matter. *United States v. Lovasco*, 532 F.2d 59, 61 (8th Cir. 1976).

and is not supported by any testimony in the record.

A more plausible hypothesis may be drawn from the record. That respondent's anxiety and his telephone calls to the Inspector inspired calls from Wellner to the United States Attorneys requesting that they should expedite the proceedings against respondent. This analysis can be more readily drawn from the record than the attempt by the government to excuse its conduct by making unsupported statements as a basis for the delay, and thus express a virtuous reason for its delay. It is to be noted that the Postal Inspector's Report, (D. Exh. A), stated that there was no evidence at that time that the son was responsible for the thefts.

The findings of prejudice to respondent's ability to defend against the charges, and unjustified, unnecessary

and unreasonable delay by the government are the very elements that this Court in *Marion* approved as actual prejudice and which *Marion* suggested should be shown at trial. There is no speculation or potential prejudice here, but demonstrated facts to support the findings of the lower Courts, which the government has not questioned here, but were attacked by the government in a footnote (Brief, p. 45 n. 37).

Thus, under the standards of *Marion*, this Court should agree that the Appeals Court was correct in dismissing the three Counts of the indictment relating to possession.

B. Where the defendant has shown actual prejudice including unreasonable, unexplained and unjustified delay, there is no need to prove that the government used the delay as a device to gain a tactical advantage over the respondent.

The government argues that respondent failed to show that the delay was an intentional device to gain a tactical advantage over him; however, the government has failed to show any justification for its failure to prosecute defendant after defendant showed actual prejudice.

In *United States v. Finkelstein*, 526 F.2d 517, 526 (2nd Cir. 1975), the government showed justification for its action although a showing of actual prejudice was made by the defendant. Here no such showing was made.[7]

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[7] In *United States v. Churchill*, 483 F.2d 268, 275 (1st Cir. 1973), Chief Judge Coffin in a concurring opinion stated:

> In the past we have not adopted the approach of some other courts in shifting the burden of proof as to prejudice from delay, *see, e.g.*, United States v. Rucker, 150 U.S.App.D.C. 314, 464 F.2d 823 (1972). I hesitate to

(continued)

The government wants to eliminate all review of its decisions, by requiring the defendant to prove that the government delayed prosecution in order to gain a tactical advantage for a violation of due process. The government concedes nothing by this for it would be impossible to obtain this proof.[8] Most, if not all government agents, United States Attorneys or Department of Justice lawyers would be hardpressed to admit that they sat back knowing that the defense would be impaired by the delay.

(footnote continued from preceding page)

recommend an arbitrary time limit which would trigger a shifting from a defendant to the government. But it seems to me that where the government is responsible for the deliberate tactical delay in the formal institution of criminal proceedings for almost the entire limitations period, without notice to the accused, we would well be justified in imposing on the government the burden of proving the absence of prejudice, difficult though that burden may be to sustain.

[8] Government employees are the only persons who are likely to have firsthand knowledge on the issue (bad faith on the part of the government), and they may be reluctant to testify as to that knowledge. Since the facts surrounding a delay will seldom be so clear that they permit an inference of bad faith intent on the part of the government, the defendant cannot prove the requisite material element by any means other than such testimony. . . . . .
Even if he is permitted to discover police documents, many facts within the knowledge of the government may never have been put on paper. And the discovery of police documents will not be of assistance in those cases in which the prosecuting attorney is responsible for the delay. The defendant will still be forced to rely upon potentially hostile government witnesses to sustain his burden of proof. Finally, if the cause of the delay is not readily apparent, the defendant will be forced to prove a negative proposition–that no good cause for the delay could possibly exist. For these reasons, the defendant should merely have to allege that there has been an unexplained delay. The government will then have to come forward with evidence showing that a delay was permissible. Note, *The Right to Speedy Trial,* 20 Stanford Law Review 476, 502, 503 (1968).

Thus, the concession by the government is of token value, and offers nothing to insure a fair trial due to prejudicial actions taken by the government.

It is apparent that there must be accountability by the prosecutor for his acts of delay which created prejudice. This appears to be the only way now to force the prosecutor to justify his actions, and to have his acts reviewed by the Courts.[9]

In *United States v. Mandujano,* ____ U.S. ____, 48 L.Ed.2d 212, 233 (1976), Justice Brennan, in a concurring opinion, discusses prosecutorial abuse and states:

> There can be no doubt that sanctioning unfettered discretion in prosecutors to delay the seeking of criminal indictments pending the calling of criminal suspects before grand juries to be interrogated under conditions of judicial compulsion runs the grave risk of allowing "the prosecution [to] evade its own constitutional restrictions on its power by turning the grand jury into its agent."

Thus, by analogy, the Courts should not sanction unfettered discretion in prosecutors when an abuse of that discretion by prejudicial delay without reason subverts the requirement of fundamental fairness in a criminal jury trial.[10]

The government delayed arresting defendant against whom its case was complete. In such a situation, the government has made a deliberate choice for a supposed advantage. This was a deliberate and avoidable choice on the part of the law-enforcement authorities.[11]

[9] See *Discretionary Justice Preliminary Inquiry,* Kenneth Culp Davis, 1969, pps. 209-214.

[10] *Cf. Hampton v. United States,* 425 U.S. 484, 494 n. 6 (1976), (J. Powell concurring).

[11] See Note, *The Right to a Speedy Trial,* 20 Stanford Law Review 476, 489 (1968).

C. The district court has the inherent discretionary power derived from the common law to dismiss a case for want of prosecution where respondent has been prejudiced to the extent that he cannot have a fair trial, and the government gives no necessity, justification or explanation for its delay.

The government has not touched on the right of the District Judge to dismiss a case for want of prosecution in its brief.

In *United States v. Furey*, 514 F.2d 1098, 1103 (2nd Cir. 1975), the Appeals Court discusses the power of a Federal Court to dismiss a case for want of prosecution whether or not there has been a Sixth Amendment violation, and that this power has been derived from the common law.

The Appeals Court reviews the cases that support this proposition and states that this power is independent of Sixth Amendment considerations; that it is an outgrowth of the Court's supervisory authority with respect to its own jurisdiction; and an exercise that has traditionally been within the Court's discretion.[12]

Further, Judge Heaney stated in his dissent in *United States v. Quinn*, 540 F.2d 357, 363 (8th Cir. 1976):

[12] *Mann v. United States*, 113 U.S.App.D.C. 27, 304 F.2d 394, *cert. denied*, 371 U.S. 896, 83 S.Ct. 194, 9 L.Ed.2d 127 (1962); *District of Columbia v. Weams*, 208 A.2d 617 (D.C.Mun.App. 1965); *Ex parte Altman*, 34 F.Supp. 106 (S.D.Cal. 1940); *cf. United States v. Cartano*, 420 F.2d 362, 363 (1st Cir. 1969), *cert. denied*, 397 U.S. 1054, 90 S.Ct. 1398, 25 L.Ed.2d 671 (1970); *Mathies v. United States*, 126 U.S.App.D.C. 98, 374 F.2d 312, 314-15 (1967). Restated in Rule 48(b), F.R.Cr.P., see Advisory Committee Notes to Rule 48, 8A Moore's Federal Practice ¶48.01.

Also see: Note, *Justice Overdue – Speedy Trial for the Potential Defendant*, 5 Stanford Law Review 95, 104 (1952).

> The discretionary authority is broadly described. The cited cases[13] present factually the post-arrest situation, but the Court's authority over its jurisdiction is not so limited. Reason dictates this conclusion. Judicial concern for the preservation of proof, the maximization of the deterrent effect of prosecution, the minimization of potential additional criminal conduct and the sure arrest of the individual apply no less forcefully to the pre-arrest situation. The Supreme Court has not indicated otherwise.

In *Nardone v. United States*, 308 U.S. 338 (1939) Mr. Justice Frankfurter stated at pps. 341-342:

> Dispatch in the trial of criminal causes is essential in bringing crime to book.... The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

The government has not appealed from the findings of the Appeals Court that there was unjustified, unnecessary and unreasonable delay, and prejudice to respondent's ability to defend against the charges.

The District Judge dismissed a case in which there was a want of prosecution. As the record reflects, there was no attempt by the government to justify its actions. Thus, the District Judge rightfully used his discretionary power where there was a denial to

[13] *United States v. Furey, supra; United States v. McWilliams*, 163 F.2d 695, 696 (D.C.Cir. 1947); *Ex Parte Altman, supra; District of Columbia v. Weams, supra.*

respondent of a fair trial, and where the government did not explain or justify its action.

The District Judge's discretionary power should not be interfered with here based on the record made by respondent, and the lack or avoidance of a record made by the government. The District Judge's good sense and fairness was reflected in his dismissal of the indictment.

D. Respondent has proven the actual prejudice that denied him a fair trial. Further, the government could have predicted that seventeen months of inertia would have had this result.

The government argues that the Appeals Court below has confused the standards for a Sixth Amendment violation under *Barker v. Wingo*, 407 U.S. 514 (1972) with the standards under *United States v. Marion*, *supra*, for a Fifth Amendment Due Process claim.

Barker, *supra*, instructs that "a balancing test necessarily compels Courts to approach speedy trial cases on an *ad hoc* basis"; that there are four factors to be considered in assessing whether a defendant has been deprived of his Sixth Amendment Right: length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant (at p. 530). *Barker* does not say that all these factors must be present to establish a Sixth Amendment violation; they are some of the factors to be considered.

There is nothing in *Barker* that limits these factors for consideration only to Sixth Amendment violations, nor that prevents them from being considered as actual prejudice under a Due Process claim for pre-accusation delay.

This Court referred to *Brady v. Maryland*, 373 U.S. 83 (1963) as precedent in *Marion*, *supra*, on the Fifth

Amendment discussion (*Marion*, at p. 324), and in *Brady*, this Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the *good faith or bad faith of the prosecution* (at p. 87).[14]

Thus, prosecutorial overreach is not mandated when there has been proof of actual prejudice.

This Court has also alluded to a number of Court of Appeals cases that have touched the due process question in determining when and in what circumstances delays causing actual prejudice required the dismissal of the prosecution.[15]

Here, the District Judge as well as the Appeals Court held that the loss of the evidence of Tom Stewart, who died and who could have testified that respondent did not know that certain guns were stolen from the United States mails, was prejudicial to respondent (Pet. App. 5a). This evidence was vital for respondent since the

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[14] Also see *United States v. Agurs*, ____ U.S. ____, U.S.L.W. 5013, 5015 (1976).

[15] *United States v. Marion*, *supra*, at p. 324, n. 17, citing the following cases: *Benson v. United States*, 402 F.2d 576, 580 (9th Cir. 1968); *Schlinsky v. United States*, 379 F.2d 735, 737 (1st Cir. 1967); *United States v. Capaldo*, 402 F.2d 821, 823 (2nd Cir. 1968); *United States v. Lee*, 413 F.2d 910, 913 (7th Cir. 1969); *United States v. Wilson*, 342 F.2d 782, 783 (2nd Cir. 1965); *United States v. Harbin*, 377 F.2d 78, 80 (4th Cir. 1967); *Acree v. United States*, 418 F.2d 427, 430 (10th Cir. 1969); *Nickens v. United States*, 323 F.2d 808, 810 n. 2 (D.C.Cir. 1963).

In *United States v. Wilson*, *supra*, the Appeals Court gives alternative grounds for prejudice as expressed in *Marion*, *supra*, on p. 783, that there must be a showing that the delay in obtaining the arrest warrant was prejudicial or part of a deliberate, purposeful and oppressive design for delay.

knowledge that the guns were stolen is essential to establish guilt under 18 U.S.C. §1708.[16] This Court in *Barker* held that if witnesses die or disappear during a delay, the prejudice is obvious (*Barker*, at p. 532). Here, there is no idle speculation of a violation of the Fifth Amendment. If trial commenced promptly, Tom Stewart would have been alive to testify to matters that could acquit respondent. Thus, the prejudice caused by the delay was clear.

The government adopts Judge Henley's hypothesis in his dissent, that the name Stewart seems to have come up for the first time when the respondent testified in support of the Motion. Judge Henley stated that one may suspect that this claim of prejudice on the death of Stewart was nothing but a fabrication. This is certainly a novel concept, for there is no apparent law that requires the defendant to signal his testimony before the pre-trial hearing, as well as at the criminal proceeding. If the government had any doubt about this testimony of the deaths, they never expressed it to the District Judge, nor did they ask for a continuance of the pre-trial proceeding to make further inquiry as to this testimony and its materiality. The Appeals Court majority opinion states that the government concedes that Tom Stewart did exist and was employed by the Terminal Railroad (Pet. App. 5a).

Further, the government argues policy to this Court, that during delay additional facts may come to light to show that the person under suspicion was not actually involved, or that additional facts may be necessary to prove guilt to a jury, or additional facts may be received to implicate additional people in the crime.

[16]It is to be noted that another witness died in the interim, respondent's brother, who witnessed all of the transactions between Boaz and respondent. No mention is made by either the District Court or the Appeals Court about the prejudice due to the loss of this testimony due to prosecutorial delay.

That further delay according to the government benefits potential defendants. This is speculation on the part of the government, and cannot be extracted from the facts in this case.

In *Woody v. United States*, 370 F.2d 214 (D.C. Cir 1966) the majority opinion sets forth an answer to the policy statement of the government. Judge Bazelon stated that delays prior to arrest which hinder or prevent presentation of a defense shackle our system of determining truth through the adversary process (at p. 216).

Chief Justice Burger dissented in *Woody*, in which there was a death of a witness three and one-half months after the alleged offense, but as Justice Burger stated, the witness would have been dead at time of trial and the witness' testimony merely represented a "slender hope" (at p. 223). This case does not rest on "slender hopes and judicial speculation". Here, Tom Stewart, who died more than a year after the completion of the investigation, would certainly have been available for the trial, and this would satisfy the nexus between the delay and the death (*Woody*, at p. 223).

Justice Burger in *Woody* held that a defendant can prevail if he can show sufficient prejudice (at p. 222). Further, Justice Burger's dissent which weighs the length of delay with the quantum of proof for prejudice appears to be in accord with the Eighth Circuit's decision in *United States v. Naftalin*, 534 F.2d 770, 773 (8th Cir. 1976), as the delay increases, the specificity with which prejudice must appear diminishes. (In an identification case).

The government further argues that there must be a breach of a duty owed by the government in order to trigger a Fifth Amendment violation; that since respondent did not prove prosecutorial overreach the

events here were fortuitous (Brief, p. 29).[17] The government also argues that it has the right to delay accusation due to "simple inertia" (Brief, p. 20).

This laissez-faire attitude, fortuity and simple inertia, is not what due process demands after the completion of the investigation.

As a result of the government's carelessness it owes a duty to respondent to anticipate through its "inertia" that evidence may be lost to the defendant to trigger a Fifth Amendment violation.[18]

In *Estes v. State of Texas*, 381 U.S. 532, 542, 543 (1965) this Court stated:

> Nevertheless, at times a procedure employed by the State involves such a probability that prejudice

[17]Interestingly, the government has apparently changed its position here from its position in *Marion*. In *Marion*, the government conceded that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if delay caused substantial prejudice and the delay was an intentional device to gain a tactical advantage over the accused. In Brief, p. 29 fn. 21 the government changes its position to one claiming that the remedy for a *Brady* violation is the award of a new trial not the bar of adjudication of the charges. Actually, an award of a new trial would not resolve the basic problem of a fair trial here, for a material witness is not available and respondent has been prejudiced in his criminal trial.

[18]It must be recognized, however, that different cases may present varying fact patterns which would demand varying "grace" periods for the police to finish the business that is essential before an arrest can be made. A more flexible standard may therefore be desirable. Such a standard may be supplied by the tort concept of foreseeability. Under such a test, the court would weigh the facts in each case to determine whether or not it is reasonable for the prosecution to have foreseen that a defendant would have suffered a loss of witnesses, evidence, or memories during the pre-arrest delay period. Note, *Pre-Arrest Delay: Evolving Due Process Standards*, 43 New York Law Review 722, 738 (1968).

> will result that it is deemed inherently lacking in due process. Such a case was In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:
>
> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* (emphasis in original) of unfairness. * * *
>
> [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 [99 L.Ed. 11]." At 136, 75 S.Ct. at 625. (Emphasis supplied).

When the government waited seventeen months based on simple inertia it had to anticipate that the defendant would suffer a high probability of prejudice.

E. The government owes a duty to respondent here through its delay and his resultant prejudice, although there is no evidence of prosecutorial overreach, and although he has been indicted within the statutory period. The Due Process Clause of the Fifth Amendment has been triggered here and the Statute of Limitations does not control. This Due Process claim must be considered on an ad hoc basis.

Here, respondent discusses separately:

1. The denial of Due process through the impact of pre-accusation delay and prejudice.
2. The lack of control of the Statute of Limitations on the facts in this case.

3. The duty of the government to prosecute when it has probable cause to do so.

1. The denial of due process through the impact of pre-accusation delay and prejudice.

In the recent case of *United States v. Agurs, supra,* this Court held that a fair analysis of the holding in *Brady, supra,* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial (at p. 5015).

The Appeals Court held that Tom Stewart's testimony was material. His testimony could have proved respondent's innocence. The loss of it prejudiced the respondent's ability to defend against the charges. Thus, under the rule in *Agurs*, the loss of this vital evidence would affect the outcome of his trial. See *Brady v. Maryland, supra.*

The Sixth Amendment demands that the defendant "have compulsory process for obtaining witnesses in his favor", and a fair trial under the Fifth Amendment would demand the defendant's right to present these material witnesses on his behalf.

A series of due process cases have effectively answered the issue the government raises about its duty to respondent for its prejudicial delay.

The government's delay has withdrawn from the defendant an indispensable right, the opportunity to be heard in his defense. *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934). He has been denied the means of presenting his best defense, and essential fairness is lacking here since he cannot put his case effectively in Court, *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942).

The government's delay has infected the trial and prevented a fair trial, *Lisenba v. California*, 314 U.S.

219, 236 (1941), by denying to respondent the benefit of witnesses. *Burwell v. Alabama*, 287 U.S. 45, 65, (1932).[19]

The crux of due process has been summed up in *Malinski v. People of State of New York*, 324 U.S. 401, 416, 417 (1945) (J. Frankfurter concurring):

> The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

Also see *Rochin v. California*, 342 U.S. 165, 169 (1952).

Thus, this Court must determine whether the respondent can obtain a fair trial under the Fifth Amendment Due Process Clause without a material witness, the only witness who can corroborate his testimony that he did not know the guns to be stolen.[20]

If this Court rules that although this testimony is material to a fair trial, but that the government can

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[19]See *Petition of Provoo*, 17 F.R.D. 183, 196, 202 (D.C. Md. 1955), *aff'd memo. sub nom, United States v. Provoo*, 350 U.S. 857 (1955).

[20]Due Process demands that defendant's counsel have sufficient time to marshal his evidence, and refuses to permit conviction on the basis of evidence reached by perjured testimony or coerced confessions. By the same reasoning, due process may be denied if defense is required after delay has resulted in loss of evidence or a material reduction in its value. Note, *Justice Overdue–Speedy Trial for the Potential Defendant*, 5 Stanford Law Review 95, 107, 108 (1952).

withhold prosecution, and that there are no controls on this conduct other than the proof of intentional delay, then this Court gives carte blanche to prosecutorial indifference to the rights of a defendant. This Court would also establish a double standard, one that permits, tolerates and condones prosecutorial "inertia", but one that demands that Courts and defendants, once the prosecutor makes up his mind to proceed with indictment, rush to a trial under Statutory and Federal Rule demands.[21] Courts and defendants would thus be subject to the starting gun of the prosecutor.[22]

Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. *McNabb v. United States*, 318 U.S. 332, 340 (1943). This adminstration should insure that vague, unsupported claims of the government of good faith, and concern over the rights of a defendant do not outweigh supported claims of a denial of a fair trial. Broad principles have been asserted by the government, but the record must support these principles and that record is lacking here.

Now Chief Justice Burger stated in *Nickens v. United States, supra,* on p. 810, n. 2:

> Although it has not been directly decided, due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused; a fugitive or one who had concealed his wrongdoing could obviously not claim he was oppressed by delay.

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[21] Rule 50 Federal Rules of Criminal Procedure; 18 U.S.C. §3161-3174.

[22] When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his. *United States v. Marion,* at 331 (Douglas J., concurring).

These very elements were the findings of the Eighth Circuit here, unreasonable pre-accusation delay coupled with prejudice.

The government argues that though the federal investigators may believe that their investigation supports probable cause for guilt, this may not necessarily be the United States Attorney's position. However, the evidence here is stronger than the investigator's belief that they had sufficient evidence to present for respondent's guilt. The United States Attorney announced to the District Court that he had scheduled the matter for the grand jury's consideration seventeen months later with apparently no new evidence other than the statement given to him on October 2, 1973, by the Postal Inspector. Thus, the statement of October 2, 1973, in the judgment of the prosecutors did establish probable cause.

If the United States Attorney had come in with evidence that additional witnesses or evidence had been sought, then there may have been another result here. There is no record here of the government's activities subsequent to October 2, 1973. Wellner discussed the case with Coughlin and Adelman of the United States Attorney's office on four or five occasions (A. 20). However, the record is silent as to the time, nature and substance of these discussions. There is no support for the government's statement that it was attempting to get evidence on the son, or others, or possible evidence to free respondent from suspicion. In fact, the investigation report of October 2, 1973, states there was no evidence at the time of the report of any responsibility on the part of respondent's son.

Further, this case does not involve special reasons for delay of an indictment since this does not involve the matter of narcotics, nor is this a complicated case of conspiracy or fraud. This is an individual case of stolen mail matter.

The government's concern for the rights of the defendant by delay is mere rationalization to avoid this Court placing limitations on their conduct.

In *Marion, supra,* this Court set parameters on pre-accusation delay. Therefore, this Court should mandate prompt disposition by the government of completed investigations.

The government has argued that the Appeals Court's construction of due process would interfere in an unwarranted manner with the functioning of the grand jury.

The government also argues that it would have to present matters to the grand jury without complete information, that there would be unwarranted accusation and escape from sanctions by some.

This argument by the government does not deal with the facts here in the record. The United States Attorney conceded that it has scheduled the matter for the grand jury in March, 1975. It had no additional information to present to the grand jury other than the report dated October 2, 1973.

The District Court's finding that

> the evidence disclosed and we find that as of September 26, 1973 and in no event later than October 2, 1973, the Government had all the information relating to defendant's alleged commission of the offense charged against him, but did not charge defendant or present the matter to the grand jury until more than 17 months thereafter. (Pet. App. 14a).

is not challenged by the government.

The government wants this Court to sanction "*simple inertia*" (Brief, p. 20). The public policy arguments that delay is a quest for the truth, does not fit the evidence in this case. Respondent, who was the offender in October, 1973, for possession of stolen mail matter, is

the indicted in March, 1975, based on the same evidence recorded in October, 1973.

Respondent, in fact, kept pushing the Postal Inspector to learn what was going to happen to him. This is not a case where the accused fled. This is a case where the accused gave a statement, and stayed around maintaining contact with the Postal Inspector. No one can complain that the file was forgotten or lost, for the phone calls from respondent to the Postal Inspector kept the facts fresh in the Inspector's mind.

Thus, the argument by the government here that the Court of Appeals' decision interferes in an unwarranted manner with the functioning of the grand jury, is not a conclusion one can make from the record below.

2. The lack of control of the Statute of Limitations on the facts in this case.

The government argues against the requirement that Courts consider timeliness of criminal charges on an ad hoc basis where there is no prosecutorial overreaching and where the charges have been brought within the Statute of Limitations.

The issue of the necessity of proving prosecutorial overreach has been discussed and argued in other points. The matter of the Statute of Limitations where there has been pre-accusation delay and prejudice has been specifically dealt with in *Marion, supra,* on p. 324:

> Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim prejudice to their defense, it is appropriate to note here *that the Statute of Limitations does not fully define the appellees rights with respect to the events occurring prior to indictment.*[23] (Emphasis supplied).

[23] See Note, *The Right to a Speedy Trial,* 20 Stanford Law Review, 476, 492 (1968).

Further, in *Dickey v. Florida*, 398 U.S. 30, 47 (1970) J. Brennan in a concurring opinion stated:

> We said in *Ewell, supra*, 383 U.S. at 122, 86 S.Ct. at 777, that "the applicable statute of limitations * * * is usually considered the primary guarantee against bringing overly stale criminal charges." Such legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay. But for some crimes there is no statute of limitations. None exists, for example, in prosecutions of federal capital offenses, 18 U.S.C. §3281. And, even when there is an applicable statute, its limits are subject to change at the will of the legislature, and they are not necessarily co-extensive with the limits set by the Speedy Trial Clause. Judge Wright, concurring in the result in Nickens v. United States, 116 U.S. App. D.C. 338, 343 n. 4, 323 F.2d 808, 813 n. 4 (1963), observed: "The legislature is free to implement the [speedy-trial] right and to provide protections greater than the constitutional right. But the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment, whatever the terms of the statute." Cf. *Nickens, supra*, at 340 n. 2, 323 F.2d. at 810 n. 2.

The existence of a legislative statute can never foreclose a fundamental constitutional right, and thus it can only be seen as an outer bound and not as forestalling standing to complain of an infringement of the constitutional right which occurs during the time period.[24]

This requires that the District Court assess on a case to case basis that "delicate judgment" that requires the

[24]Comment, *The Speedy Trial Guaranty: Criteria and Confusion in Interpreting Its Violation*, 22 DePaul Law Review, 839, 863 (1973).

defendant have a right to a fair trial, when he alleges actual prejudice caused by the government's pre-accusation delay, although the Statute of Limitations has not run.

The government argues further that under *Hoffa v. United States* 385 U.S. 293 (1966) that there is no constitutional right to be arrested.

There is a distinction here between the issues in *Hoffa* and the fact situation here. Here, there were single criminal transactions with a definite cut-off date of prosecution, and the Postal Inspector had all of the elements of the offense as of October 2, 1973. There was nothing further to be done, for Boaz stated that he obtained all of the guns from respondent, and there was an accounting for the guns allegedly stolen from the mail shipment. Thus, there was no difficulty in establishing the exact length of the pre-arrest delay. In *Hoffa*, however, there was a record of a continued investigation. Further, there was no concern in *Hoffa* with an arrest delay. In *Hoffa*, the squeeze was between the probable cause of the Fourth Amendment and the right to counsel of the Sixth. There was no concern with a speedy trial.[25]

Hoffa is, thus, distinguishable on the issue of Fifth Amendment due process, and the resultant prejudice to defendant's right to a fair trial.

3. The duty of the government to prosecute when it has probable cause to do so.

The government argues that there are difficulties inherent in a basically ad hoc approach to pre-accusation delay where there has not been prosecutorial

[25]Note, *Pre-Arrest Delay: Evolving Due Process Standards*, 43 New York Law Review 722, 727, 728 n. 33 (1968).

overreach, since there will be a need to ascertain at what point the government reasonably might be charged with having "delayed" formal accusation.

There is no problem here ascertaining the time which triggered the beginning of the delay.[26]

The record before the District Judge is brief, and spells out clearly that defendant on October 2, 1973, was the offender.[27]

It points out the respondent's offense was possession of stolen mail matter, to wit: eight Browning Arms handguns (D. Exh. A; A. 21, 22).

The government stipulated at the pre-trial hearing that the Postal Inspector recommended prosecution on the basis of the report submitted October 2, 1973, and that was the only evidence presented to the grand jury. The Postal Inspector supplied no supplemental material to the United States Attorney in written form other than Exhibit A.

The United States Attorney received information about a sale of a gun after the grand jury returned the indictment against respondent. This additional information obviously had nothing to do with the indictment against respondent, for the presentation of the matter to the grand jury had already been scheduled without this evidence.

The stipulation by the government also suggests that the United States Attorney believed he had probable cause to present the matter to the grand jury, for he says that the matter was scheduled for the grand jury without the additional information he acquired after the return of the indictment.

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[26]In *United States v. MacDonald*, 531 F.2d 196, 202 (4th Cir. 1976) the Appeals Court stated that the critical issue is the identification of the event and consequently the date, marking the beginning of the delay.

[27]This clearly registers respondent as an accused.

Rule 4, Federal Rules of Criminal Procedure, may be used as basis for this argument.

It provides:

> If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it.

Steinberg, *The Constitutional Right and its Application to the Speedy Trial Act of 1974*, 66 Journal of Criminal Law and Criminology 229 (1975) states on p. 238:

> In order to combat this problem, sufficient evidence must be defined as that amount of evidence necessary to establish that "there is *probable cause* to believe that an offense has been committed and that the defendant has committed it. . . ." Since probable cause is sufficient evidence for the state to arrest the prospective defendant, there is no adequate reason why the state should not be compelled to arrest and charge the defendant at that time. Defining sufficient evidence as evidence sufficient to show probable cause compels the state to prosecute at a more readily ascertainable time. At the same time, such a construction enables the defendant to adequately prepare his defense.

It is apparent thus that the decision as to whether a Fifth Amendment violation occurred must depend on an ad hoc approach to determine at what point the government had probable cause to compel the State to prosecute.

The District Court found that as of September 26, 1973, and in no event later than October 2, 1973, the government had all the information relating to

respondent's alleged commission of the offenses and the government did not explain or justify the delay.

Thus, the facts in this case readily and easily pinpoint the time at which the government had all the evidence for probable cause to prosecute respondent, and had the duty to do so.

The philosophy of the Justice Department to the Speedy Trial Act (18 U.S.C. §3161 *et seq.*) has relevancy to pre-indictment delay especially when the government can plead simple inertia as a cause, and it has been expressed by Justice Rehnquist while Assistant Attorney General in remarks to the Senate Subcommittee on Constitutional Rights in 1971:

> None of us interested in the administration of criminal justice, Mr. Chairman, whether inside or outside of the Government, whether within or without the bench and bar, can fail to be struck by the stark fact of intolerable delays in our system of administering criminal justice. The Department [of Justice] is of the view that some of the root causes of this unjustifiable delay must be sought out, identified, and dealt with, regardless of whether the solution for any particular facet of the problem tends to bear more heavily on one side of the criminal justice equation than the other. Therefore, we are unwilling to categorically oppose the mandatory dismissal provision. For it may well be, Mr. Chairman, that the whole system of Federal justice needs to be shaken by the scruff of its neck and brought up short with a relatively peremptory instruction to prosecutors, defense counsel and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill. (Senate Hearings, p. 96). 4 U.S. Code Congressional and Administrative News 7413, 7414 (93rd Congress, 2nd Session, 1974).

This Court held that under the Sixth Amendment: "A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis" (*Barker, supra,* at p. 530). *Barker* also identified some of the factors which Courts should assess in determining whether a particular defendant has been deprived of his rights. In *United States v. Marion, supra,* this same ad hoc treatment is supported when this Court stated, to accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.[28] This Court in *Chambers v. Maroney*, 399 U.S. 42, 54 (1970) refused to fashion a per se rule that the government wants this Court to do here.

The government's argument that there will be insuperable problems by recording the various times of the various stages of the prosecution, must be weighed against the prejudice to a defendant's right to a fair trial. An ad hoc approach to pre-accusation delay is warranted and will ferret out prosecutorial abuse.

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[28]Judge Friendly in *Kyle v. United States,* 297 F.2d 507 (2nd Cir. 1961) stated as to due process on p. 514:

> The reason why the showing of prejudice required to bring down the balance in favor of a new trial will vary from case to case is that the pans contain weights and counterweights other than the interest in a perfect trial.

II

THE DISTRICT COURT SHOULD NOT RESERVE A RULING ON A DUE PROCESS CLAIM BASED UPON PRE-ACCUSATION DELAY AND PREJUDICE UNTIL AFTER TRIAL. FURTHER, THE GOVERNMENT FAILED TO REQUEST THE DISTRICT COURT TO RESERVE ITS RULING UNTIL AFTER TRIAL.

The government relies on Rule 12(e) Federal Rules of Criminal Procedure.[29]

The government claims that the pre-trial motion would be a dress rehearsal for the trial itself. The government goes on to say that the evidence introduced by the government at trial may establish the defendant's guilt so overwhelmingly that the loss to the defense of certain evidence is plainly harmless beyond a reasonable doubt. The government hypothesizes further that the defendant may still obtain an acquittal. The government also suggests that the defendant may be mistaken as to the government's theory of its case, and, therefore, the loss of the evidence was not material and therefore would not constitute prejudice based on the facts presented at trial.

Thus, the government seems to suggest that the government and the defendant will both benefit from a

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[29] Actually, the Rule was 12(b)(4) at the time of the pre-trial hearing on April 25, 1975, and on October 8, 1975, when the District Judge entered his Order. The rule change was effective December 1, 1975.

Rule 12(b)(4) Federal Rules of Criminal Procedure provides in part:

> Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue.

determination of prejudice at the conclusion of trial.[30]

An analysis of the record here below supplies the best answer to the government's argument. The record below is brief. The issues at the pre-trial hearing were totally limited to the facts which established the delay and the resulting prejudice. Nothing was presented to prove the guilt of the defendant, and, therefore, the determination of the motion was clearly made without the trial of the general issue.[31]

The record reflects the investigation its conclusion, the prejudice to the defendant, and the subsequent indictment. The parameters of the pre-trial evidentiary hearing can be neatly drawn by the District Court within its discretion as was done here. The government's claim of a dress rehearsal for the trial has no basis in fact, and is merely designed to avoid facing its responsibility early. Actually, a reading of the record below reveals that it may have taken all of an hour.

Judicial economy would demand that a matter which can be disposed of within a few hours be resolved in that manner. A two hour pre-trial motion would release a crowded calender of the District Judge of the need for a protracted jury trial.

There are other considerations against waiting to the end of the trial.

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[30] Rule 12(b)(1) Federal Rules of Criminal Procedure, in effect April 25, 1975, provided:

> "any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

[31] The government wishes to extend this rule to a Sixth Amendment violation where there is minimal prejudice to the defendant. It is submitted that the standards under *Barker* for a Sixth Amendment violation should be examined by the District Court as well before trial. The same principles of judicial economy and a fair trial would dictate that this constitutional issue not await a jury verdict.

The defendant who may have small economic resources is relieved of the burden of counsel fees for a protracted jury trial, if his pre-trial motion is sustained.

Further, the judge is still called upon to make the decision as to the pre-accusation prejudice, and the jury verdict should not influence his judgment, although the government is hopeful that a verdict of guilty will be a strong influence on the District Judge to resolve the ruling on the motion in the government's favor.

The respondent's contention that this is a matter that should not await the outcome of the trial is supported by the House Committee on the Judiciary which stated the purpose of Rule 12:

> Further, the Committee hopes to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary.[32]

It is to be noted that the government is asking the Court here for an advisory opinion on the issue of delaying the hearing on the Motion to Dismiss to the conclusion of the trial since this matter was never raised in the District Court or before the Appeals Court, and thus, there is an absence of a record to show an abuse of discretion by the District Judge.

In *Hughes v. Thompson*, 415 U.S. 1301, 1302, 1303 (1974), Mr. Justice Douglas noted 12(b)(4), in stating that it would be an extremely unusual case for an appellate judge to direct a district judge that he should exercise his discretion by postponing an arraignment until after the Motion to Dismiss the Indictment has been resolved.

This Court in *United States v. Covington*, 395 U.S. 57, 60 (1969) explained Rule 12(b)(1):

[32] 8 Moore's Federal Practice §12.01[3](12-12).

> A defense is thus "capable of determination" if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.

The government has not supported its claim that the facts have to be tried in order to assist the Court in determining the validity of the Motion. It has merely conjectured this would have to occur, and the record below refutes this speculation.

In *United States v. Whitted*, 454 F.2d 642, 644 (8th Cir. 1972), the Appeals Court held that the rule (12b) requires the District Court to determine the motion before trial unless special circumstances exist.

In *United States v. Dooling*, 406 F.2d 192, 197 (2nd Cir. 1969), the Appeals Court discussed the purpose of the rule:

> The evident purpose of these two provisions of Rule 12(b) is to encourage the disposition before trial of as many motions as possible which challenge the right of the government to continue a prosecution. Obviously this practice is greatly preferable to considering such a motion only after the completion of a lengthy trial.

Further, in *United States v. De Diego*, 511 F.2d 818, 824 (D.C. Cir. 1975), the District Judge denied an evidentiary hearing prior to trial, and the Appeals Court held that a preliminary evidentiary pre-trial hearing lasting considerably less than several days could have been undertaken when the trial was not scheduled for four weeks.

The basic issue here is whether a jury trial with the loss of evidence by the death of a material witness can be fair. This decision must be made before trial, for the District Court must evaluate prior to trial whether the defendant should stand trial in view of his due process claim.

The Appeals Court affirmed the District Court's finding that respondent was prejudiced in his ability to defend against the charges. Respondent could not have a fair trial, and a trial under such a circumstance would be constitutionally infirm, and oppress a District Court with more unnecessary work and time in an already overburdened system.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be sustained.

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